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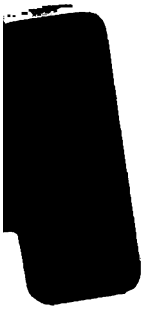

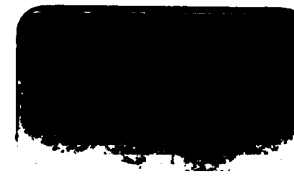

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A

TREATISE

ON THE

Law of Inſurance.

IN FOUR BOOKS.

I. OF MARINE INSURANCES.
II. OF BOTTOMRY AND RESPONDENTIA.
III. OF INSURANCE UPON LIVES.
IV. OF INSURANCE AGAINST FIRE.

By SAMUEL MARSHALL,
SERJEANT AT LAW.

Firſt American, from the Engliſh Edition.

TWO VOLUMES IN ONE.

Laudo mercatorem, qui fidem, etiam contra leges datam, ſervat; ſed, et laudo judicem, qui fraudes et nequitias mercatorum non fovet, et reſcindit pactiones, quas lex reſcindi jubet. Judicis eſt leges ſequi; nec diſputare an turpiter faciat aſſecurator, qui fidem datam violat.—Eſto, turpiter faciant; ſed, eſt turpiter facit qui contrà leges pacſcitur.

Byn. Quæſt. jur. priv. lib. 4. c. 5.

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JANUARY, 1805.

PREFACE.

THE deſign of the following work has been to collect from every authentic ſource, and to aſcertain, with as much preciſion as the ſubject would admit of, the genuine principles of the law of inſurance; and ſo to arrange and methodiſe them, that not only lawyers, but merchants and others, might, without much difficulty, acquire a competent knowledge of them.

It is now many years ſince I firſt conceived the idea of attempting ſuch a work. But after I had made ſome progreſs in it, I perceived that, if completed upon the plan I had adopted, it would be found too abſtract and elementary, to afford that aſſiſtance to the commercial world, or even to the profeſſion of the law, which it was my ambition to render to both.—I perceived that the leading principles which govern contracts of inſurance lie within a narrow compaſs; and that it is only the application of thoſe principles to particular caſes, that could form a work of general utility. My averſion to retrace my former ſteps, and to go again over the ground I had ſo recently trodden, concurring with other circumſtances, induced me, at that time, to lay aſide my deſign; and it was not till lately that I determined to reſume it. But though, in my new undertaking, I have adopted a different plan, and made a new arrangement of the ſubject, ſtill I found that my former reſearches,

reſearches, and the collections I had made, greatly facilitated my labour.

In works of this nature, the greateſt attention to method is neceſſary. Their utility in practice, in a great meaſure, depends on their being properly arranged. Method, however, is only uſeful ſo far as it conduces to perſpicuity. Too ſtrict an adherence to methodical arrangement only defeats the end which is meant to be attained by it. A multiplicity of diviſions and ſubdiviſions only ſerve to burthen the memory and weary the patience. I have therefore avoided, as much as poſſible, diviſions too large and comprehenſive, on the one hand, and too trifling and minute, on the other.

The different branches of marine inſurance ſo blend themſelves with each other, that the forming of any diſtinct and ſatisfactory analyſis of it, is a taſk of no inconſiderable difficulty. In the various treatiſes on this ſubject which I have had occaſion to examine, I have ſeen no arrangement that I could entirely approve.—Of the arrangement now adopted, the reader will be able to form his own judgment, upon inſpection of the following analyſis. It will there appear that the ſubject has been divided, as nearly as it could be, according to the natural order of events, from the firſt idea of the contract, till the final cloſe of the tranſactions upon which it is to operate, or which ariſe out of it.

The numerous caſes that have been decided in the courts of *Weſtminſter*, upon queſtions of inſurance within the laſt 60 or 70 years, afford the beſt materials for a treatiſe on this ſubject. They at once ſupply the rules of law, and ſhew the application of them.—And as the utility of a work

a work of this nature greatly depends on its being as complete as poſſible within itſelf, ſo as to render a recurrence to other books ſeldom neceſſary, I have, in order to give the preſent work this advantage, in as great a degree as the limits I had preſcribed to it would admit, introduced into it all the decided caſes I have been able to collect, upon each branch of the ſubject, rejecting ſuch only as I deemed unworthy of notice.—In abridging theſe caſes, I have obſerved one uniform rule. Each will be found to conſiſt of three diſtinct parts;—the facts, the deciſion, and the reaſons aſſigned for it.—Where the deciſion of a caſe cannot be well underſtood, without ſhewing the points inſiſted upon in argument, theſe are briefly ſtated. —But though I have taken great pains to ſhorten each caſe as much as the plan of the work would admit, I am ſorry to find the book ſwelled to a ſize conſiderably beyond that to which I had hoped to confine it.

A few of the caſes have never before been in print. Some others I have cited from manuſcript notes, which ſeemed preferable to any hitherto publiſhed.

Under each head I have endeavoured, with the requiſite perſpicuity, to lay down the principles of the law, as I have been able to collect them from decided caſes, and from the beſt authorities, ancient and modern, which I have been able to procure.

There is ſcarcely any contract which affords a greater number of queſtions of doubt and difficulty than that of marine inſurance. Though the principles of the law applicable to this contract, are, in general, well defined; yet the policy being uſually of one uniform tenor, and the tranſactions upon

upon which it is to operate, infinitely various and complicated, the conflicting rights of the parties are often ſo equally balanced, that it is impoſſible to decide between them, without ſometimes reſorting to very nice diſtinctions. It often happens, too, that the real juſtice of the caſe, as between the parties, muſt yield to the ſtrict rules of law: And it ſeems to be a general ſubject of complaint, in moſt commercial countries, (*a*) that, upon ſuch occaſions, courts of juſtice are ſometimes tempted to forſake the rules of law, and to lean in favour of the ſuffering party. It is not to be wondered at, then, if the doctrines delivered from authority in *Weſtminſter Hall* ſhould be found, in ſome few inſtances, to be irreconcileable with the true principles of the law of inſurance.

It is ſaid that good faith ſhould preſide in all the tranſactions of commerce, and equity in the deciſion of the queſtions to which it gives riſe.—That good faith ſhould preſide in all the tranſactions of commerce, is a truth which cannot be too frequently repeated, or too forcibly inculcated.—And that equity ſhould, on proper occaſions, have its due weight in the deciſion of commercial queſtions, I am alſo ready to admit. But, by equity I would not be underſtood to mean thoſe wild and fanciful notions of right, in which no two men can agree. I mean that rectitude of judgment, which is the reſult of natural reaſon, enlightened and directed by the wiſdom of the law. Under pretence of equity, the law is not to be forſaken. Where that is clear, it muſt prevail, however hard it may appear

(*a*) Vid. *Bynk.* Quæſt. jur. priv. lib. 4. c. 5; *Straccha*, p. 541, n. 6; *Emerig.* tom. 2, p. 355.

pear in particular caſes. *Hoc quidem perquàm durum eſt, ſed ita lex ſcripta eſt.* It is ſafer, perhaps, to rely on the conſcience of the law, than on the conſcience of any man, however wiſe and virtuous he may be. *Omnia ſunt incerta, cum à jure diſceſſum eſt. Nec præſtari, quidquam poteſt, quale futurum ſit, quod poſitum eſt in alterius voluntate, ne dicam libidine.* (*a*)

Wherever I have found any deciſion, or any doctrine advanced, which militated againſt any acknowledged principle of law, I have, with a proper freedom, but with decency and reſpect, pointed them out to the notice of the reader, with ſuch obſervations as I thought it my duty to make on them. I have not, however, unneceſſarily ſtepped aſide to make captious objections. I have only ſought, where the occaſion called for it, to reſtore the true principles of the law; and the better to enable me to do ſo, I have availed myſelf of the works of foreign writers of acknowledged authority upon the law of nations, upon marine law, and the law of inſurance; and I have freely had recourſe to them, wherever their aſſiſtance would enable me to clear up a doubt, or to ſolve a difficulty.

Nothing can more promote the true intereſts of commerce, than that the law, which ſhould regulate the contracts of merchants, ſhould be well underſtood. If the preſent work ſhould at all conduce to that end, or, in any material degree, advance the general proſperity of my country, my pains will be ſufficiently rewarded.

With reſpect to *Bottomry* and *Reſpondentia;* though theſe contracts are not at preſent much in uſe in this country, I have collected from the *Roman* law and

(*a*) *Cic.* ad fam. lib. 9, epiſt. 16.

and from foreign authors, ſuch materials as ſeemed neceſſary to enable me to form a conſiſtent treatiſe on this branch of the ſubject.

Inſurance upon Lives, and *Inſurance againſt Fire*, are now become very important contracts in this country. Upon each of theſe I have put together all the materials I could collect, and have digeſted them into ſuch a form, as ſeemed moſt likely to render thoſe parts of the book uſeful to ſuch perſons as may have occaſion to conſult them.

Having thus ſhortly explained the nature and deſign of this work, I now, with conſiderable diffidence, ſubmit it to the judgment of my own profeſſion, and of the commercial world; *Poſtulans a lectore, ut ſi quid ſuperfluum, vel perperàm poſitum in hoc opere invenerit, illud corrigat et emendet; vel conniventibus oculis pertranſeat; cum omnia habere in memoria, et in nullo peccare, divinum ſit potius quam humanum.* (*a*)

SAMUEL MARSHALL.

SERJEANT'S INN,
Feb. 2d. 1802.

(*a*) *Braƈt. de leg.* 1.

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A TREATISE

A

TREATISE

ON THE

LAW OF INSURANCE.

BOOK THE FIRST.

CHAP. I.

INTRODUCTION.

Of Inſurances in general.

Definition of inſurance.

INSURANCE is a contract whereby one party, in conſideration of a ſtipulated ſum, undertakes to indemnify the other, againſt certain perils or riſks, to which he is expoſed, or againſt the happening of ſome event (*a*). The party who takes upon himſelf the riſk is called the *inſurer*, ſometimes the *underwriter*, from his ſubſcribing his name at the foot of the policy; the party protected by the inſurance is called the *inſured*; the ſum paid to the inſurer, as the price of the riſk, is called the *premium*; and the written inſtrument, in which the contract is ſet forth and reduced into form, is called a *policy of inſurance*.

The

(*a*) Contractus Aſſecurationis, id eſt avertendi periculi, dicitur contractus innominatus. FACIO UT DES, DO UT FACIAS, unde debet regulari juxta naturam contractuum quibus aſſimilatur; aſſimilatur autem emptioni et venditioni, propter prætium quod datur ratione periculi; quia qui aſſecurationem facit propter prætium, dicitur emere eventum periculi. *Rotæ Genuæ, deciſio* 3. *n.* 28. *deciſio* 39. *n.* 9.

Abuſes of inſurances reſtrained.

The riſks againſt which inſurances may be made are infinite. Formerly great frauds were practiſed upon ignorant and unwary perſons, under colour of inſurances of different ſorts, which the legiſlature found it neceſſary from time to time to repreſs. It appears that, in the reign of Queen *Ann*, ſeveral perſons opened offices for making inſurances on *marriages*, *births*, *chriſtenings*, *ſervice*, &c. whoſe fraudulent practices were ſoon found ſo injurious to the public, that by the ſtat. 9 *Ann. c.* 6. *ſ.* 57. a penalty of 500*l.* is impoſed on every perſon ſetting up ſuch office, and 100*l.* on every perſon making ſuch inſurances in any office already ſet up.

But the moſt miſchievous ſpecies of theſe fraudulent inſurances is that upon *lottery chances*, which, long after the paſſing of the above act, ſprung from that ſpirit of gaming which public lotteries muſt always excite in the people. Theſe, however, after many unſucceſsful endeavours to reſtrain them in the annual lottery acts, have, by the ſtat. 27 *G.* 3. *c.* 1., which was made expreſsly for that purpoſe, been conſiderably diminiſhed.

The inſurances of greateſt public utility, and to which the following work will be confined, are,

1. *Marine inſurances*, including the ſubject of *bottomry* and *reſpondentia*, which are a ſpecies of marine inſurance;
2. *Inſurances* upon *lives*; and
3. *Inſurances* againſt loſſes by *fire*.

The firſt of theſe will be the ſubject of the preſent book.

Marine Inſurances.

Marine inſurances are made for the protection of perſons, having an intereſt in ſhips, or goods on board, from the loſs or damage which may happen to them from the perils (*a*) of the ſea, during a certain voyage, or a fixed period of time (*b*).

The

(*a*) In compliance with cuſtom the word *peril* is here uſed in a ſenſe in which it is not uſually underſtood. It does not here mean *danger*, *hazard*, *jeopardy*, according to its common acceptation; for to ſay that a loſs was occaſioned by a particular peril, would, according to that acceptation, be to ſay that the loſs aroſe from the *danger* of ſuch loſs. In inſurance the word peril generally

The utility of this contract conſiſts in the protection it affords to maritime commerce, by dividing loſſes, when they happen, between many, ſo as to make them fall lightly upon each, and thus enables individuals to embark their whole capitals in hazardous enterpriſes. Without inſurance, foreign commerce could only be carried on by the few who are wealthy enough, or bold enough, to run alone the riſks which neceſſarily attend the proſecution of it. Theſe would engroſs all maritime commerce to themſelves, and their profits, for want of competition, would be immoderately high. Their utility.

The utility of marine inſurances cannot be better expreſſed than in the words of the preamble to the ſtat. 43 *Eliz. c.* 12. which recites that, 'By means of 'policies of inſurance it cometh to paſs, upon the loſs 'or periſhing of any ſhip, there followeth not the un-'doing of any man; but the loſs lighteth rather eaſily 'upon many, than heavily upon *few*; and rather up-'on them that adventure not, than thoſe that do ad-'venture; whereby all merchants, eſpecially of the 'younger ſort, are allured to venture more willingly 'and more freely.'

Much pains and induſtry have been employed in fruitleſs endeavours to diſcover the origin of marine inſurances. This, like every attempt to trace the firſt imperfect beginnings of thoſe inventions which have ariſen by imperceptible degrees out of human neceſſities, has only terminated in doubt and diſappointment. Some inquiry, however, upon this ſubject, may be expected in this place; and yet the moſt careful reſearches ſcarcely enable us to aſcertain about what time this contract firſt came into general uſe even in *Italy*, where it ſeems to have had its origin. Whether their origin can be traced.

Cleirac,

generally ſignifies the *happening* of the event or misfortune of which danger was apprehended.

(*b*) Vide *Valin. jur* art. 1. h. t. p. 26.—Aſſecuratio eſt conventio de rebus tutò aliundè transferendis, pro certo præmio, ſeu eſt averſio periculi. *Stypm. pars* 4. c. 7. n. 262.—Averſio periculi ita dicta quod aliquis alterius periculum in mari averſum it, aut in ſe recipit. *Loccen.* lib. 2. c. 5. n. 1.

the only object of their care. Finding themſelves maſters of the greateſt part of the then known world, which they had reduced to ſubjection by a ſeries of unparalleled conqueſts, they might eaſily have engroſſed the whole commerce of the nations they had ſubdued. But they diſdained the ſober purſuits of induſtry, the want of which they compenſated by the ſpoils of the conquered provinces.

Beſides, the jealous policy of the *Roman* ſtate, by an ancient law eſtabliſhed by *Clodius* the tribune, in the time of the firſt *Punic* war, and afterwards renewed by the *Julian* law, prohibited ſenators from building or poſſeſſing ſhips, leſt the power reſulting from this ſpecies of property might render them formidable to the ſtate.

What commerce they carried on was principally, if not wholly, confined to the *Mediterranean*, *Ægean*, and *Euxine* ſeas, which were almoſt ſurrounded by their own dominions, and guarded by the armed fleets of the ſtate, ſo as to remove all apprehenſion of *enemies or pirates*. Their ſmall veſſels rarely ventured out of port but in fine weather, and then only to coaſt along the ſhores, ſeldom venturing out of ſight of land, even in the time of *Auguſtus* (*a*); the mere *perils of the ſea* muſt therefore have been to them very inconſiderable. So that, whether we contemplate the *extent* of the *Roman* maritime commerce, or the *perils* to which it was expoſed, we may reaſonably conclude that it did not ſtand much in need of the protection of inſurance.

Some, however, have fancied that they could diſcover in the *Roman* hiſtory, the firſt traces of this contract.—*Livy* relates, that during the ſecond *Punic* war, certain contractors employed to tranſport ammunition and proviſions to *Spain*, ſtipulated that the republic ſhould indemnify them againſt ſuch loſſes as might be occaſioned by the enemy, or by tempeſts in the courſe of the voyage. "*Impetratum fuit, ut, quæ navibus imponerentur ad exercitum Hiſpanienſem deferenda, ab hoſtium tempeſtatisque vi, publico periculo eſſent.*" (*b*) Others rely on a paſſage in *Suetonius*, who relates that the emperor *Claudius*, in

(*a*) Vid. *Huet*, Commerce des Anciens, ch. 16. ſ. 9, 10, 11.

(*b*) *Liv.* Hiſt. lib. 23. n. 49.

in a time of ſcarcity at *Rome*, in order to encourage the importation of corn, took upon himſelf all the loſs or damage that might be occaſioned by ſtorms and tempeſts in its paſſage thither. *Negotiatoribus certa lucra propoſuit, ſuſcepto in ſe damno, ſi quid per tempeſtates accidiſſet, et naves, mercaturæ cauſâ, fabricantibus, magna commoda conſtituit.*(a) Some years afterwards, contractors, who had been employed to convey proviſions to the armies ſerving in the provinces, were proſecuted for having ſet up pretended ſhipwrecks as a ground of charge, the republic having taken ſuch loſſes upon itſelf: *Publicum periculum erat à vi tempeſtatis, in iis quæ portabantur ad exercitus.*(b)

But theſe inſtances only ſerve to ſhew, that the contractors were to tranſport the ſtores purchaſed of them to the places of their deſtination, at the riſk of the republic. They have ſcarcely a reſemblance in any one particular to the contract of inſurance, and are to be looked upon merely *as a mode of* encouraging perſons to ſupply the demands of the public. Upon no better authority, however, than the above paſſage in *Suetonius*, has *Malyne* roundly aſſerted, that *Claudius* had introduced the cuſtom of inſurance, 'whereby,' ſays he, 'the danger and adventure of goods is divided, re-parted, and borne by many perſons;—to the end that merchants might augment their traffic, and not adventure all in one bottom to their loſs and overthrow.'(c) The ſame author adds, that 'this cuſtom coming to the knowledge of the inhabitants of *Oleron*, was recorded by them, and ſet down for a law, to be obſerved by all the ſea-coaſt towns of *France*.' And yet there is not a word in the laws of *Oleron*, nor in thoſe of *Wiſbuy* or of the *Hans-Towns*, as collected by *Malyne* himſelf, which has the leaſt alluſion to inſurance.

A paſſage in one of *Cicero*'s letters is alſo adduced, as a proof that the *Romans* were acquainted with this contract. —Having gained a great victory in *Cilicia*, and obtained conſiderable ſpoils there, he wrote to the *proquæſtor*, or under treaſurer, *Canninius Salluſt*, at *Laodicea*, in theſe words: "*Laodiceæ me prædes accepturum arbitror omnis pecuniæ*

(a) *Suet.* ch. 18. (b) *Liv.* lib. 25. n. 3. (c) Lex merc. 103.

"*cuniæ publicæ, ut et mihi et populo cautum ſit ſine vecturæ* "*periculo.*" (*a*) From this *Emerigon* (*b*) would infer an order to the proquæſtor to contract with perſons who ſhould be anſwerable for the riſk of ſending this money by ſea to Rome. But the ſenſe of the paſſage by no means warrants this inference. On the contrary, it ſeems that *Cicero* only meant to acquaint the *proquæſtor*, that he would have the money at *Laodicea*, and there take ſecurity for its being paid at *Rome*, without any riſk, either to himſelf or the republic. If this be the right interpretation of *Cicero*'s words, it ſeems, as Mr. *Park* has very properly obſerved, (*c*) to bear a much ſtronger alluſion to the idea of remitting the money by means of *bills of exchange*, than to that of inſuring againſt the perils of the ſea.

There is in the pandects, an obſervation of *Ulpian*, which affords greater colour for ſuppoſing that the contract of inſurance was not altogether unknown to the *Romans*, than any of the paſſages above referred to. He ſays, "*Illa ſtipulatio, decem millia ſalva fore promittis?* "*valet.*" (*d*) This paſſage ſhews, however, that the contract alluded to, whatever it might have been, was very little known at the time *Ulpian* wrote, ſince he thought it neceſſary to obſerve that *it was not illegal.*

Growth of maritime Commerce.

As maritime commerce, when carried to a certain extent, muſt, as has been already obſerved, draw after it the contract of inſurance; and as the growth of the one muſt neceſſarily induce a correſponding improvement in the principles of the other, we will here take a curſory view of the progreſs of commerce from its revival in *Europe* in the twelfth century, to the period of its attaining its preſent greatneſs.

The cauſes which contributed to its revival.

During the dark ages which ſucceeded the fall of the *Roman* empire, down to the twelfth century, all was *Gothic* barbariſm in the weſt of *Europe*. Science, literature, commerce, were things unknown or wholly neglected. Many cauſes at length contributed to revive the ſpirit

(*a*) *Cic.* Ad Fam. 2. 17. (*b*) Pref. 4. (*c*) Introd. 20.
(*d*) Dig. l. 45, de verb. oblig.

ſpirit of commerce, and renew the intercourſe between nations.

The cruſades, about the cloſe of the eleventh century, opened a vaſt communication between *Europe* and the *Eaſt*. *Conſtantinople*, the capital of the *Eaſtern* or *Greek* empire, had eſcaped the ravages of the northern barbarians who had overthrown that of the *Weſt*. It was ſtill a great and commercial city, where the elegances of poliſhed life yet remained; and this became the place of general rendezvous for the chriſtian armies on their way to *Paleſtine*, or on their return from thence. And though the object of theſe expeditions was conqueſt, and not commerce, and though the iſſue of them proved unfortunate to theſe romantic and infatuated warriors, their commercial effects were beneficial and permanent. The cruſaders brought back with them a taſte for the refinements and luxuries of the *Eaſt*; and this ſoon created a demand, which could only be ſupplied by an extenſive commerce with thoſe parts. The cruſades.

The cloſe of the holy war was followed by the invention of the mariner's compaſs, or at leaſt its introduction into *Europe*, about the year 1260. This, with the conſequent improvements in navigation, opened a wide field for maritime enterpriſe. Diſcovery of the mariner's compaſs.

The feudal ſyſtem which had been eſtabliſhed in all the weſtern parts of *Europe* by the northern conquerors, had, about this time, attained its greateſt height, and the overgrown power of the nobles, its natural concomitant, while it held the great body of the people in ſlavery, controlled, or gave law, even to the ſovereign himſelf. To create ſome power that might counterbalance that of theſe potent vaſſals, it became the policy of the monarchs of *Europe* to erect communities or corporations in the conſiderable towns, with excluſive juriſdiction, and privileges which might protect the inhabitants from ſervitude, or dependence upon the neighbouring barons, or any other than the ſovereign himſelf. This expedient was firſt adopted by *Lewis the Groſs*, about the beginning of the twelfth century; and though an ancient *French* author calls it a new and wicked device to procure liberty to ſlaves, and encourage them to ſhake off the dominion of their The erecting of corporations.

their maſters (*a*), yet the effects of this meaſure ſoon juſtified the policy by which it was dictated. The towns became the aſylum of the oppreſſed, the acquiſition of liberty produced a ſpirit of induſtry; and commerce ſoon began to eſtabliſh an intercourſe between different nations.

Commerce of the *Lombards.*

The free ſtates of *Italy*, which aroſe out of the ruins of the weſtern empire, ſought, by the arts of peace, to raiſe themſelves to that eminence which others had obtained by arms and conqueſt. During the 12th and 13th centuries, the commerce of *Europe* was almoſt entirely in the hands of theſe Italians, more generally known in thoſe ages by the name of *Lombards*, of whom companies or factories ſettled themſelves in almoſt every ſtate in *Europe*, where they became the only conſiderable merchants and bankers, and in thoſe times rivalled even the *Jews* themſelves in the arts of uſury. One of theſe companies ſettled in *London*, from whom *Lombard-ſtreet*, in that capital, took its name. The rival republics of *Venice* and *Genoa*, at this time, took the lead in commercial adventure. They brought the rich productions of *India* at firſt by a northern circuit, through the *Caſpian Sea* to *Aſtracan*, and from thence by the *Black Sea* to *Europe*. The *Venetians* afterwards, having obtained permiſſion from the *Pope* to trade with the infidels, and from the *Calif* of *Egypt*, the liberty of trading on the coaſts of *Egypt* and *Aſſyria*, opened a more direct communication with *India*, the trade of which they now wholly engroſſed, and continued the moſt powerful maritime ſtate in *Europe*, till the *Portugueſe* doubled the *Cape of Good Hope* in 1497, and eſtabliſhed an uninterrupted communication by ſea, between *Europe* and the *Eaſt Indies*.(*b*)

Inſurance ſuppoſed to have been firſt brought into uſe in *Italy*.

As the maritime commerce of theſe *Italian* ſtates appears to have been carried to a very conſiderable extent about the end of the 13th century, it is extremely probable that inſurance came into uſe in *Italy* about that time. From thence, after the advantages attending it came to be underſtood, it was tranſplanted into moſt of the countries where the *Lombards* had eſtabliſhed their trading companies. According to *Malyne*, (*c*) they introduced it into *England* ſomewhat earlier than into the neighbouring

(*a*) Vid. *Hume* Hiſt. vol. 2. p. 118. (*b*) *Huet*, Commerce des anciens, ch. 48. ſ. 13. p. 311. (*c*) Lex merc. 105.

ing countries on the continent; and, as a proof of this, he ſays, that even *Antwerp*, in its meridian glory, borrowed inſurance from *England*, and that down to the time in which he wrote (1622), there was in every policy made at *Antwerp*, and other places in the *Low Countries*, a clauſe inſerted, that it ſhould be in all things the ſame as policies made in *Lombard-ſtreet*, in the city of *London*, the place where the *Lombards* are known to have firſt ſettled, and carried on their commerce in *England*, and where the merchants of *London* uſed to hold their meetings before the *Royal Exchange* was built.

When into England.

Anderſon (*a*) ſays, that the vaſt commerce carried on about the middle of the 16th century, between *England* and the *Netherlands*, introduced the practice of inſuring from loſſes by ſea, by a joint contribution. But the preamble to the ſtat. 43 Eliz. c. 12, which was paſſed in 1601, diſtinctly ſtates, that it had been an *immemorial uſage* among merchants, both *Engliſh* and foreign, when they made any great adventure, to procure inſurance to be made on their ſhips or goods adventured. From this it may reaſonably be ſuppoſed, that inſurance muſt have been in uſe in *England* long before the middle of the preceding century.

Commerce of the *Hanſeatic* League.

But while the *Lombards* were ſucceſsfully cultivating their commerce in the ſouth of *Europe*, the ſame ſpirit began to manifeſt itſelf in the north; and about the middle of the 13th century, the cities of *Lubec* and *Hamburgh* opened a trade with the *Lombards*. Theſe, however, were ſoon obliged to enter into a league of mutual defence againſt the piracies of the *Danes*, *Swedes*, and other barbarous nations ſurrounding the *Baltic*. The benefits reſulting from this confederacy, ſoon induced other towns to ſolicit to be admitted into it; and in a ſhort time, eighty of the moſt conſiderable cities of *Germany* and the *Netherlands* were received into this alliance, which took the name of the *Hanſeatic League*. They ſupplied the reſt of *Europe* with naval ſtores, and eſtabliſhed in ſeveral towns a ſtaple, in which their commerce was regularly carried on, under the protection of this powerful confederacy. *Bruges*, in *Flanders*, was the moſt conſiderable of theſe. It be-

Commerce of the *Flemings*.

(*a*) Hiſt. com. vol. 2, p. 108.

became the centre of communication between the *Lombards* and the *Hanſeatic* merchants, and the great emporium for the merchandize of the *Eaſt* and *Weſt*. The *Flemings* traded with both in that city. This infuſed into them a habit of induſtry, which, while they retained their ancient free inſtitutions, rendered *Flanders* the moſt opulent, the moſt populous, and the beſt cultivated country in *Europe*.

Meaſures of *Edward* III. to introduce the woollen manufacture into *England*.

Edward III. upon his going into *Flanders*, preparatory to his firſt invaſion of *France*, about the year 1340, was ſtruck with the flouriſhing ſtate of theſe provinces, of which he ſoon diſcovered the true cauſe, and endeavoured to excite a ſimilar ſpirit of induſtry among his own ſubjects, who, blind to the advantages of their ſituation, and ignorant of the ſource from which opulence was deſtined one day to flow into their country, neglected his wiſe admonitions; nor would they even attempt thoſe manufactures, the materials of which they furniſhed to theſe foreigners. The King, however, encouraged *Flemiſh* artizans to ſettle in his dominions; and cauſed many wiſe laws to be made for the encouragement and regulation of trade, particularly the ſtat. 11 *Ed.* 3, c. 2, by which all perſons were prohibited from wearing any woollen cloth but of *Engliſh* fabric. By this he gave a beginning to the woollen manufactures of *England*, and firſt turned the active and enterpriſing genius of his people to thoſe arts which have raiſed this country to the firſt rank among commercial nations.

Petition againſt the *Lombards*.

The *Lombards*, however, ſtill engroſſed the whole of the carrying trade with *England*. Some attempts were made by parliament, in the reigns of *Edward* III. and *Richard* II. to encourage *Engliſh* ſhipping, but without effect; for we find, that in the 18th year of *Henry* VI. the commons petitioned, that no *Italian*, or other merchants, of the countries beyond the ſtreights of *Gibraltar*, ſhould ſell here any other merchandize than that of the countries beyond thoſe ſtreights. And the reaſon aſſigned for the regulation thus prayed, was, that the *Italians* had become the carriers, not only of the commodities brought from the countries within the ſtreights, but alſo of thoſe from the countries without the ſtreights, which

which were not brought in ſuch abundance, nor ſold ſo cheap, as when they were brought by the merchants of the countries from which they came. They prayed, therefore, that this might paſs into a law for ten years; but the King did not conſent to it. (*a*) At length, however, by ſtat. 1 *Rich.* 3, c. 9, great reſtraints were laid, both upon theſe *Italian* merchants, and their commerce.

Their commerce reſtrained in *England*.

But, beſide the diſadvantage of having almoſt all the foreign commerce of *England* carried on by ſtrangers, even the internal trade of the country was continually checked in its growth, or wholly reſtrained by the rapacity and bad policy of the government, either by enormous and arbitrary impoſitions, or by grants of monopolies, which for ages operated as a conſtant diſcouragement to induſtry and ingenuity, till by the ſtat. 21 *J.* 1, c. 3, they were declared to be *contrary to the ancient and fundamental laws of the realm.*

Engliſh trade checked by impoſitions and monopolies.

It may be *recollected* alſo, that *England*, from the time of the conqueſt, down to the time of *Henry* VII. was almoſt conſtantly engaged in foreign or domeſtic wars. The arts of peace were, during that time, exiled, as it were, from this country, and ſo remained, until they found in the comparative tranquillity of the reign of that cautious prince, a degree of protection, under which they began to acquire ſome portion of ſtrength and ſtability.

Two great events alſo, which happened in this reign, gave to the reviving ſpirit of commerce, a new and extraordinary impulſe. While the *Portugueſe* were creeping along the coaſt of *Africa*, and ſlowly and cautiouſly exploring a paſſage by ſea to *India* by the eaſt, *Columbus* conceived the project of ſailing thither by the weſt, and in the attempt, diſcovered the *Weſt Indies*, and the vaſt continent of *America*, in the year 1492. The *Portugueſe* ſtill perſevered, and, in the year 1497, achieved their great deſign. *Vaſques de Gama* doubled the *Cape of Good Hope*, and opened a paſſage by ſea to *India*, *China*, and *Japan*. *Europe* now emerged out of that darkneſs in which ſhe had been involved from the ſubverſion of the *Roman* empire. The arts awoke from a ſlumber of 12 centuries. So

Diſcovery of *America*, and the paſſage by ſea to the *Eaſt Indies*.

(*a*) Vid. *Reeves*'s hiſt. of ſhipping, p. 12. 15.

So vaſt a field for foreign diſcovery and commercial enterpriſe was now opened to the view of the maritime ſtates of *Europe*, that the thirſt of military glory, ſo long predominant, ſoon gave place to the avidity of wealth, and a paſſion for adventure in the newly diſcovered regions. Colonization followed, and the *Engliſh* ſoon formed valuable ſettlements in the *Eaſt* and *Weſt Indies*, and on the continent of *America*.

Flemiſh commerce ruined by *Philip* II.

The *Flemings*, however, ſtill retaining their ancient free inſtitutions, were yet the firſt commercial people in *Europe*. Their induſtry, their manufactures, their foreign trade, ſtill ſecured to them a high degree of wealth and proſperity, when all was overthrown by the bigotry and tyranny of *Philip* II. Many of the perſecuted fugitives forſook their country and joined their fellow ſufferers in the *Batavian* moraſſes, and with them, under the illuſtrious heroes of the houſe of *Orange*, bravely vindicated their liberties, and finally triumphed over their oppreſſors.

Transferred to *England* and *Holland*.

Many alſo ſought an aſylum in *England*, encouraged and protected by the wiſe and beneficent policy of *Elizabeth*. To both countries they carried their induſtry and their uſeful arts; and thus was laid the moſt ſolid foundation of that commercial greatneſs and maritime ſtrength to which *England* and *Holland* afterwards attained; and which, in this kingdom, has ſince been carried to a height unparalleled in the hiſtory of mankind.

Marine Law.

The growth of maritime commerce in *Europe*, of which I have rapidly traced the progreſs, muſt have been accompanied by a correſponding improvement in marine law. Several codes were formed by different ſtates; at firſt for the regulation of navigation, and for defining the authority of the maſters and other officers of ſhips, and the duty and rights of the ſeamen; afterwards for the regulation of maritime contracts.

Rhodian law.

The earlieſt ſyſtem of marine law, of which we find any account in hiſtory, was that compiled by the *Rhodians*, after they had, by their commerce and naval victories, obtained the ſovereignty of the ſea, about 900 years before

fore the chriſtian æra. *Cicero*, in his oration in favour of the *Manilian* law, ſays of that people, "*Rhodiorum uſque ad noſtram memoriam diſciplina navalis et gloria remanſit.*"

Whether their maritime code merited equal applauſe, we are now unable to determine, becauſe there is reaſon to ſuppoſe that it has not been tranſmitted down to us; not at leaſt in a perfect ſtate. A collection of marine inſtitutions, under the denomination of *Rhodian* laws, may be ſeen in *Vinnius*; but they bear evident marks of a ſpurious origin. (*a*) Some have ſuppoſed, that the *Rhodian* laws were adopted by the *Romans* during the firſt *Punic* war, when they firſt became a naval power. Others affirm, that they were incorporated with the *Roman* law, by *Juſtinian* and others. (*b*) Perhaps the more probable conjecture is, that different parts of theſe laws were, from time to time, adopted by that people, as the neceſſities of their marine required.

As to the *Phœnicians*, the *Carthaginians*, the *Athenians*, the *Corinthians*, and other maritime ſtates of antiquity, whether they had marine laws of their own inſtitution, no where appears. If any ſuch ever exiſted, they have not deſcended to our times.

Amalphitan code.

The firſt code of modern ſea-laws was compiled about the time of the firſt cruſade, towards the end of the eleventh century, by the people of *Amalphi*, who had then become conſiderable for their commerce and maritime power. It is not improbable, that this code conſiſted principally of the *Rhodian* inſtitutions, which were found ſtill in force in the countries bordering upon the *Mediterranean*; and being collected into one regular ſyſtem, were, for a conſiderable time, generally received as law in thoſe countries.

Conſolato del mare.

But other ſtates, as they grew into eminence, formed new collections of marine law, in which the old inſtitutions were altered and modified to ſuit the improvements of the times, or their own particular intereſts. Great inconvenience was ſoon found to ariſe from this diverſity of rules upon a ſubject that had long been regulated by one general ſyſtem, which was looked upon as part of the law

(*a*) Vid. *Emerig.* Pref. 3. (*b*) Vid. *Selden* de dominio maris, l. 1. c. 10. *Vinnius* in Peckium 190.

law of nations. This made it neceſſary for the different maritime ſtates to form a new code out of all theſe diſcordant materials; which was done, as *Grotius* informs us, (*a*) by the authority of almoſt all the ſovereigns of *Europe*. This new digeſt was denominated *Conſolato del mare*. It was originally publiſhed by order of the ancient kings of *Aragon*, in the *Catalan* tongue, and therefore probably compoſed at *Barcelona*, the capital of that province, and of the kingdom of *Aragon*. In the thirteenth century, this code was received as law in *Italy*, the *Greek* empire, *France* and *Germany*; (*b*) and *Vinnius* ſays, that moſt of the marine laws in *Spain*, *Italy*, *France*, and *England*, are borrowed from it. (*c*) *Cuſarigis* ſays of it, *Conſulatus maris, in materiis maritimis, tanquam univerſalis conſuetudo habens vim legis inviolabiliter attenda eſt apud omnes provincias et nationes.* (*d*) So that it ſeems to be conſidered as a branch of the public law; and though not quite unexceptionable in ſome reſpects, its regulations are ſtill of very high authority in every maritime ſtate in *Europe*.

Laws of *Oleron*. The collection of ſea-laws, next in point of time, as well as of celebrity, is that of *Oleron*, which, according to the *French* writers, were digeſted in the iſland of that name, under the title of *Roole des jugemens d'Oleron*, by direction of Queen *Eleanor*, the wife of *Henry* II. in her quality of ducheſs of *Guienne*, and afterwards enlarged and improved by her ſon *Richard* I. (*e*) But *Selden* denies this, and maintains that theſe laws were compiled and promulgated by *Richard* I. as King of *England*. (*f*) Theſe laws are inſerted in the beginning of the book, entitled *Us et coutumes de la mer*, with a very excellent commentary on each ſection by *Cleirac*, the learned editor.

Laws of *Wiſbuy*. The next collection which occurs in *Cleirac*, is that of the ordinances made by *the merchants and maſters of the magnificent city of Wiſbuy*, in the iſland of *Gothland*, anciently much celebrated for its commerce, now an obſcure and inconſiderable town. The true date of the promulgation of this code is not certainly known. *Malyne* (*g*) ſays, that

(*a*) *Grot.* De jure bel. lib. 3. c. 1. ſ. 5. n. 6. (*b*) *Emerig.* Preſ. 6.
(*c*) *Vinnius* Leg. Rhod. p. 190. (*d*) *Cuſarigis*, Diſc. 213. n. 12.
(*e*) *Cleirac*, p. 2. *Emerig.* preſ. p. 11. (*f*) *Selden* de dominio maris, c. 24.
(*g*) Collection of Sea Laws, p. 44.

that the laws of *Oleron* were tranſlated into *Dutch* by the people of *Wiſbuy*, for the uſe of the *Dutch* coaſt. By *Dutch* I preſume is to be here underſtood *German*; and it cannot be denied that many of the regulations contained in the laws of *Wiſbuy*, are preciſely the ſame as thoſe of *Oleron*. The northern writers pretend, however, that they are more ancient than the laws of *Oleron*, or even the *Conſolato del mare*. *Cleirac* treats this notion with great contempt, and declares that, at the time of the promulgation of the laws of *Oleron* in 1266, which was many years after they were compiled, the *magnificent city of Wiſbuy* had not yet acquired the denomination of a town. (*a*) Be this as it may, theſe laws were for ſome ages, and indeed ſtill remain, in great authority in the northern parts of *Europe*. '*Lex Rhodia navalis*,' ſays *Grotius*, '*pro jure gentium, in illo mari Mediterraneo vigebat; ſicut apud Galliam leges Oleronis, et apud omnes tranſrhenanos, leges Wiſbuenſes.*' (*b*)

With reſpect to inſurance, though it is purely a maritime contract, and would naturally find a place in the marine code of every country where it is in uſe; yet not the leaſt mention of it is found, either in the *Conſolato del mare*, or in the laws of *Oleron*. In the laws of *Wiſbuy*, indeed, according to *Cleirac*'s verſion, (*c*) are theſe words,——

'*Si le maiſtre eſt contraint de bailler caution au bourgeois pour le navire, le bourgeois ſera pareillement tenu bailler caution pour la vie du maiſtre.*

'*C'eſt à dire que, contre les hazards de la mer et de la mort, il ne peut echoir de requiſition raiſonnable à bailler caution; regulierement le bourgeois doit riſquer ſon bien, et le maiſtre ſa liberté et ſa vie, bien y puet eſtre fait poliſſe d'aſſeurance.*'

But this laſt paragraph, which alone alludes to inſurance, ſeems to be only a comment upon, or expoſition of, the foregoing, rather than a part of the original text; and its not being contained in *Malyne*'s tranſlation of the laws of *Wiſbuy*, ſtrengthens this remark.

Ordinances of the *Hanſeatic League*.

In 1597, the deputies of the *Hanſeatic League*, in a general aſſembly at *Lubeck*, drew up a ſyſtem of laws relating to navigation, for the uſe of their confederacy, to which,

(*a*) *Cleirac*, p. 3.——(*b*) *Grotius* de jur. bel. lib. 2. c. 3.
(*c*) Art. 66.

which, in 1614, in an aſſembly at the ſame place, they added ſeveral new ordinances. In theſe regulations, though the contract of bottomry is mentioned, there is not a word on the ſubject of inſurance.

Ordinance of *Louis* 14.

But the completeſt and moſt comprehenſive ſyſtem of this kind, is the famous ordinance of the marine, of *Louis* XIV. publiſhed in 1681. This excellent code was compiled and arranged by a very maſterly hand, under the inſpection of *Colbert*, the celebrated miniſter of that prince, upon an attentive reviſion of all the ancient ſea-laws of *France* and other countries, with the aſſiſtance of the moſt learned men of the time, and upon conſultation with the different parliaments, the courts of admiralty, and the chambers of commerce in *France*. It forms a ſyſtem of whatever experience and the wiſdom of ages had pronounced to be moſt juſt and convenient in the marine inſtitutions of the maritime ſtates of *Europe*. And though it contains many new regulations, ſuggeſted by motives of national intereſt, yet it has hitherto been eſteemed a code of great authority upon all queſtions of maritime law. Lord *Mansfield*, who appears to have taken much pains to obtain the beſt information, and to poſſeſs himſelf of the ſoundeſt principles of marine law, and of the law of inſurance, ſeems to have drawn much of his knowledge upon theſe ſubjects from this ordinance, and from the elaborate and uſeful commentary of *Valin*. This may be perceived in many of his judgments upon queſtions of inſurance, though his lordſhip does not always think it neceſſary to cite his authority.

Law of Inſurance.

The law of inſurance is conſidered as a branch of marine law, and was borrowed by us from the *Lombards*, who firſt introduced the uſe of this contract into *England*. It is alſo a branch of the law of merchants, being found in the practice of merchants, which is nearly the ſame in all the countries where inſurance is in uſe; and, indeed, merchants themſelves were, for a long time, the only expounders of it. The law of merchants not being founded in the particular inſtitutions, or local cuſtoms of any particular country, but conſiſting of

Law of Merchants.

of certain principles which general convenience has eſtabliſhed to regulate the dealings of merchants with each other in all countries, may be conſidered as a branch of public law. *Non erit alia lex Romæ, alia Athenis, alia nunc, alia poſt hac; ſed et omnes gentes, et omni tempore una eademque lex obtinebat.* (*a*)

Particular uſages.

Beſides the general law of merchants, there are certain uſages which prevail in particular countries, and ſometimes in particular branches of commerce. Theſe, like local cuſtoms in *England*, have the force of law where they prevail; and where they are in force, are always ſuppoſed to be in the contemplation of the parties; and the contract of inſurance is conſtrued as having been made with reference to them. But then they muſt appear to have been long eſtabliſhed; that is, as I humbly apprehend, they muſt be immemorial, or at leaſt coeval with the branch of commerce to which they belong. (*b*) They muſt alſo be reaſonable and legal; otherwiſe no notice can be taken of them in any court of juſtice.

If it be aſked where the law of inſurance is to be found; the anſwer is, in the marine law, and in the cuſtom of merchants, which may be collected, 1. From the ordinances of different commercial ſtates; 2. From the treatiſes of learned authors on the ſubject of inſurance; 3. From judicial deciſions in this country, and others profeſſing to follow the general marine law and the law of merchants.

Ordinances relating to inſurance.

1. *Particular ordinances* have, as we have already ſeen, been made in many countries upon the ſubject of marine law; and many have been made to regulate marine inſurances. But theſe have ſeldom gone farther than to define, and to ſanction by legiſlative authority, thoſe principles which were already received as law in all commercial countries. Some, indeed, have added regulations, dictated only by national or particular intereſt; but theſe are wholly diſregarded elſewhere.

The ordinances of other countries are not, it is true, in *force* in *England*; but they are of *authority*, at leaſt as expreſſing the uſage of other countries upon a contract which

(*a*) *Cic. Off.* 3.—(*b*) But ſee *Noble* v. *Kennoway*, *Doug.* 492. poſt ch. 6. ſ. 5.

which is governed by general rules, which are underſtood to form a branch of public law. *Non habent vim legis, ſed rationis.*

Of *Barcelona.* The earlieſt ordinance now extant on the ſubject of inſurances, is that of *Barcelona*, which, though without a date, yet from circumſtances diſcloſed in it, muſt have been publiſhed about the year 1435. *Emerigon* fixes the period of its publication in 1484. (*a*) But this cannot be correct; for after the crowns of *Aragon* and *Caſtile* were united by the marriage of *Ferdinand* and *Iſabella* in 1465, *Catalonia*, of which *Barcelona* is the capital, became ſubject to the laws of the united kingdom, and from that time no laws were promulgated as from that city. It appears that this was not the firſt ordinance publiſhed on this ſubject; for it recites, that '*whereas in times paſt* '*but few ordinances of inſurance have been made, this defect re-* '*quires amendment*,' &c.

Of *Florence.* The next ordinance on this ſubject was publiſhed at *Florence* in the year 1523, after that city had been raiſed to a high degree of commercial greatneſs by the wiſdom and abilities of the family of *Medicis*.

Of *Charles V.* and *Philip II.* The Emperor *Charles* V. in 1551, publiſhed a number of regulations concerning maritime commerce, called the *Caroline* code, to which his ſon *Philip* II. added ſeveral new ordinances in 1563 and 1565.

Beſide theſe, ſeveral other ſtates, and even particular cities, in more modern times, have promulgated their reſpective codes of marine law, and regulations of inſurance. Moſt of theſe will be found collected in the ſecond volume of *Magens*, to which, in the following work we ſhall have frequent occaſions to refer. But in the celebrated ordinance of the marine of *Louis* XIV. above alluded to, will be found the beſt and moſt complete ſyſtem of *poſitive law* for the regulation of inſurances, that has yet appeared in any country. Still, however, it muſt be obſerved, that many of the regulations contained in this ordinance were dictated by national intereſt, and are contrary to the general law upon the ſubject.

Of *England.* In *England*, where the practice of inſurance has been the moſt extenſive, fewer poſitive laws have been made to

(*a*) *Emerig.* Pref. 12.

to regulate it, than in any other country; and hence the practice of it with us has been found moſt conformable to the general uſage of trade. Some few ſtatutes have paſſed, from time to time, to reſtrain the abuſes of inſurance, but not one has yet been made, either to aſcertain any old principle, or to ſanction any new one. This may be accounted for, not by ſuppoſing, with a learned writer on the law of inſurances, that this law was already well ſettled, and its principles underſtood in moſt of the neighbouring commercial countries, before the uſe of it became extenſive in *England*; (*a*) but becauſe the law of merchants is conſidered as a branch of the common law, (*b*) and therefore the cuſtom of merchants, in any one particular, being once clearly aſcertained in any of the ſupreme courts, acquires from thenceforth the force of law, without the ſanction of any higher authority. It would therefore have been an uſeleſs labour for the *legiſlature to enact* thoſe very uſages, by poſitive law, which are already conſidered as part of the law of the land. Beſides, what is or is not the cuſtom of merchants is much better aſcertained in the inveſtigation of particular caſes, in courts of juſtice, than it could be by parliament, with all the information and aſſiſtance it could obtain.

Magens, indeed, wonders that the legiſlature had not laid down ſome complete ſyſtem of regulations concerning inſurances; and yet he acknowledges, "that whenever a trial at law takes place between an inſured and an inſurer, the wiſdom and impartiality of the judges, in ſumming up the evidence, and directing the jury, leaves no room to doubt that the verdict will be according to right and equity." (*c*) Still, however, he ſeems to have conceived a ſtrong deſire to have a grand ſyſtem of marine juriſprudence erected in this country, and it is probable that he meant himſelf to have been the principal architect. But he appears to have been unable to engage thoſe at the head of the government to enter into his views, and he peeviſhly tells us, that "it ſeems to be the common maxim of thoſe who ſit at the helm in theſe kingdoms, when things are not very urgent, to leave merchants to agree among themſelves,

(*a*) Vid. *Millar* on Inſur. p. 12.—(*b*) *Winch.* 24.—(*c*) *Magens*, Pref.

ſelves, and work on." A perſon leſs fond of erecting new ſyſtems might ſay, perhaps, that he could not have given a better proof of their wiſdom.

Foreign treatiſes.

2. As to *treatiſes*, the earlieſt now extant on the ſubject of inſurance is that entitled *Le Guidon de la mer*, which is found in the collection of marine inſtitutions, publiſhed at *Rouen*, in 1671, by *Cleirac*, under the title of *Les us et coutumes de la mer*. This work is evidently the production of a much earlier period than that of its publication by *Cleirac*; and yet its contents plainly ſhew that it could not have been written till after the practice of inſurance had become pretty general, and moſt of its principles well underſtood. We may therefore reaſonably conclude that it was written about the 15th century. *Cleirac* informs us, "that it was originally compoſed for the uſe of the merchants of *Rouen*, and is ſo complete in itſelf, that it fully explains all that is neceſſary to know on the ſubject of marine contracts and naval commerce; and that nothing is wanting to it but the author's name." Many faults which had crept into it, through time, and the careleſsneſs of copiers, have been corrected by the editor, who has enriched the whole by a very learned and excellent commentary of his own.

Le Guidon.

Cleirac.

Valin.

France has, in more modern times, produced three very valuable treatiſes on the ſubject of inſurances. *Valin*'s commentary on the ordinance of the marine is of the higheſt value upon every topic of marine law. On the branch which relates to inſurance, his commentary is clear, acute and inſtructive. *Pothier*, in his treatiſe on contracts, unites the moſt profound learning with the pureſt morals and the moſt comprehenſive judgment. That upon inſurance, is neat, conciſe, and maſterly. *Emerigon*, whoſe treatiſe is confined to the ſubject of inſurance, unites great learning with great practical knowledge. His book is, of all the foreign publications on this ſubject, the moſt uſeful to an *Engliſh* lawyer.

Pothier.

Many other publications on this ſubject have appeared in different countries, and in different languages, the moſt conſiderable of which are *Roccus*, *Caſaregis*, *Locennius*, *Bynkerſhoek*, and *Santerna*. To theſe we ſhall have frequent occaſion to refer in the courſe of the preſent work.

It

It is not a little ſingular, that in *England*, where the practice of inſurance has been more extenſive than in any other country, ſo little was publiſhed on this important ſubject, till within the laſt twenty years. *Malyne*, *Molloy*, *Beawes*, *Poſtlethwaite*, and ſome others leſs worthy of notice, have each in their reſpective publications, given a ſhort chapter or two on the ſubject of inſurances. Mr. *Magens*, a merchant, in 1755, republiſhed in two volumes quarto, his *Eſſay on Inſurances*, which he had before publiſhed in *German* at *Hamburgh*. The eſſay itſelf occupies but a ſmall portion of the firſt volume. It ſhews, however, a conſiderable degree of practical knowledge of inſurances, derived from the ordinances, of different countries: but the book would have been much more valuable had the author been better acquainted with the general treatiſes on this ſubject. The reſt of the work conſiſts of a number of calculations of averages, of letters and ſtate papers relating to commerce, a collection of marine and commercial ordinances, treaties of commerce, and other matters, which are often of great utility. Mr. *Weſket*, a merchant, has, in a ſort of alphabetical arrangement, put together a large quantity of materials on the ſubject of inſurances, and of a variety of other matters little connected with inſurance. Mr. *Millar*, a learned advocate of the *Scotch* bar, publiſhed at *Edinburgh*, in 1787, the *Elements of the law relating to inſurances*, in which he diſcovers great knowledge of his ſubject, derived both from foreign and *Engliſh* books. To Mr. *Park* the profeſſion of the law and the commercial world are much indebted for his *Syſtem of the law of inſurances*; a book ſo generally known that it will be unneceſſary for me to ſay more of it upon the preſent occaſion. *Engliſh authors.*

3. With reſpect to *judicial deciſions*, none are conſidered as binding authorities in our ſuperior courts, but ſuch as have been there determined, and even theſe may be re-conſidered; and if, upon a full examination, they are found to militate againſt any clear and indiſputable principle of law, they may, as in other caſes, be overruled. As to foreign deciſions, though they are of no authority in our courts, yet ſome few will be found cited in this work, in order to ſhew, upon doubtful points, how learned men in other countries have *Judicial deciſions.*

have underſtood the principles of that law, which is ſuppoſed to be in force in this. *Valet pro ratione, non pro introducto jure.*

When actions on policies were firſt brought in the courts of *Weſtminſter.*

Though foreign commerce increaſed conſiderably in the reign of Queen *Elizabeth*, and inſurance probably increaſed in a like degree, yet it appears to have furniſhed but few ſubjects of litigation in the courts of *Weſtminſter*, till towards the cloſe of that reign. The firſt caſe upon inſurance which we find in any book of reports is mentioned by Sir *Edward Coke*, (*a*) and he notices it as a mere novelty.—It appears to have been an action brought in the 30th year of Queen *Elizabeth*, on a policy on a ſhip, from *Melcombe Regis* to *Abbeville*. The loſs alleged was by detention of the King of *France* in the river *Soane*. After a verdict for the plaintiff, the defendant moved in arreſt of judgment, on the ground that the fact in iſſue, namely, the detention, aroſe out of the realm, and therefore could not be tried in *London*. But it was reſolved by the court, that the promiſe, which was the ground of the action, being made in *London*, the cauſe might be tried there; and that the detention, which was the fact in iſſue, was not the ground of the action, but a breach of the aſſumpſit.

The reaſon why ſo few actions at common law were brought on policies of inſurance before the above period, is very diſtinctly ſet forth in the preamble to the ſtat. 43 *Eliz.* c. 12, which recites, that 'Whereas heretofore aſ-'ſurers have uſed to ſtand ſo juſtly on their credits, that 'few or no controverſies have ariſen thereupon; and if 'any have grown, the ſame have, from time to time, 'been ended and ordered by certain grave and diſcreet 'merchants, appointed by the Lord Mayor of *London*, as 'men, by reaſon of their experience, fitteſt to underſtand, 'and ſpeedily to decide, thoſe cauſes.' It further recites, 'that *of late years*, divers perſons have withdrawn them-'ſelves from that arbitrary courſe, and have ſought to 'draw the parties aſſured, to ſeek their monies of every 'ſeveral aſſurer, by ſuits commenced in her Majeſty's 'courts, to their great charges and delays.'

Ancient mode of ſettling diſputes.

From this recital it appears that, before the paſſing of that act, almoſt all diſputes ariſing upon contracts of inſurance,

(*a*) 6 Rep. 47, b.

ſurance, were ſettled and adjuſted by arbitration, and without reſorting to any legal proceedings. And there ſeems to have been a particular tribunal for ſuch arbitrations eſtabliſhed in *London*, compoſed of perſons annually appointed by the Lord Mayor, in imitation of ſome ſuch eſtabliſhments in other countries. *Malyne* informs us that there was an *Office of Aſſurances* in the weſt ſide of the *Royal Exchange*, where inſurances were made, and to which belonged certain commiſſioners who were annually choſen, and who were probably the *grave and diſcreet merchants*, alluded to in the above recital.

The ſame author adds, that the authority of theſe commiſſioners was confirmed by act of parliament, in the latter time of Queen *Elizabeth*, 'for the obtaining whereof,' ſays he, 'I have ſundry times attended the committees of 'the ſaid parliament, by whoſe means the ſame was en-'acted; not without difficulty, becauſe there were many 'ſuits *in* law by action of *aſſumpſit* before that time, 'upon matters determined by the commiſſioners for aſſu-'rance, who, for want of power and authority, could 'not compel contentious perſons to perform their ordi-'nances; and the party dying, the *aſſumpſit* was accounted 'to be void in law.' (*a*)

From this it is plain that the deciſions of the commiſſioners did not give entire ſatisfaction in all caſes; and either the inſurers began to decline their juriſdiction, and ſo drove the inſured to ſeek their remedy by actions at common law, or the inſured themſelves began to prefer that mode of proceeding. But be this as it may, the novelty was thought a great grievance, and the more ſo, as a ſeparate action was brought againſt each underwriter; ſo that it was thought expedient to give a check to this practice, and therefore the ſtatute we have juſt mentioned, 'gives 'power to the Lord Chancellor to award, under the great 'ſeal, a commiſſion to be renewed yearly, for the deter-'mining of cauſes ariſing on policies of inſurance entered 'in the office of inſurances in *London*; to be directed to 'the Judge of the Admiralty, the Recorder of *London*, 'two doctors of the civil law, two common lawyers, 'and eight diſcreet merchants, or to any five of them, 'who are empowered to hear and determine all ſuch 'cauſes

The court of policies of inſurance erected.

(*a*) *Mal.* Lex merc. 106.

'cauſes in a ſummary courſe, without formalities of pro-'ceeding; and to bring parties before them, examine 'witneſſes, and enforce their decrees by impriſonment of 'the parties diſobeying them.' From theſe decrees, however, an appeal is given by bill in chancery.

Its powers enlarged.

This ſeems to have been little more than a confirmation of the authority aſſumed by the commiſſioners of the *Office of Aſſurances*, with a grant of the power of enforcing their decrees. But it happened in this, as it has in moſt caſes where it has been attempted to innovate upon the modes of adminiſtering juſtice preſcribed by the common law, that this new juriſdiction was found defective in many reſpects, and therefore the ſtat. 13 & 14 C. II. c. 23, provides, 'that *three* inſtead of five commiſſioners, '(of whom a doctor of the civil law, or a barriſter of five 'years ſtanding, ſhall be one,) may act; that they ſhall 'have power to puniſh witneſſes for wilful delay; to 'direct admiralty commiſſions to iſſue for the examina-'tion of witneſſes beyond ſea; to enable one commiſſioner 'to examine witneſſes going to ſea before a court can 'be ſummoned, notice being given to the adverſe party.'

Fallen into diſuſe.

But with all theſe additional powers, the court did not long continue to exerciſe its functions, and ſoon fell into diſuſe. To this many cauſes contributed; 1. Its juriſdiction being confined to ſuch inſurances only as related to *merchandize*, the court could not proceed in a caſe upon any other ſpecies of inſurance, (*a*) and the parties, in ſuch caſe, were obliged to reſort to the courts of common law.—2. It was determined, how properly it is not now neceſſary to inquire, that it was no bar to an action on a policy in one of the courts of *Weſtminſter*, to allege that the plaintiff had before ſued the defendant, for the ſame cauſe, in the court of policies of inſurance, and that his ſuit was there diſmiſſed. (*b*) And it is not a little ſingular, that though this was decided in the year 1656, before the ſtat 13 & 14 C. II.; yet the framers of that act made no proviſion to remedy a defect that muſt ſooner or later prove fatal to the juriſdiction of the court.—3. It was doubted whether its juriſdiction was not confined to ſuits brought by the inſured againſt the inſurer, and

(*a*) R. *Bendyr* v. *Oyle*, *Sty.* 166, 172.—(*b*) R. *Came* v. *Moy*, 2 *Sid.* 121.

and whether it could afford any relief upon a complaint made by the latter againſt the former. (*a*)—It has been ſaid alſo, that the juriſdiction of the court was confined to ſuch cauſes only as aroſe in *London*. (*b*)—It is true that the power given by the act is, 'to hear and deter-'mine cauſes ariſing on policies of aſſurance, ſuch as are 'now, or hereafter ſhall be, entered in the *office of aſ-ſurances in the city of London*.' But we learn from *Malyne* (*c*) that in this office all policies were regiſtered *verbatim*, to the end that if a policy ſhould be loſt, the inſured might not be without evidence of the contract; ſo that it would ſeem that the object of the above clauſe was not to confine the juriſdiction of the court to policies made in *London*.

But beſide the defects of juriſdiction in the court, and the conſtant partiality of *Engliſhmen* for the common law forms of judicature, another cauſe, appearing on the face of the ſtatute itſelf, muſt have, in ſome degree, contributed *to its downfal*. The act directs, 'that the commiſ-'ſioners ſhall, once in every week at leaſt, meet and ſit upon 'the execution of the commiſſion; *and that no perſon, by vir-'tue of the act, might claim or exact any fee, for any matter or 'cauſe concerning the execution of the commiſſion*.' With ſuch a clauſe in the act, it will not be wondered, if the judges and officers of this court did not attend with the requiſite punctuality to the diſpatch of buſineſs. Indeed it would ſeem, from an obſervation of Mr. Juſtice *Twiſden*, in the caſe of *Suiſter* v. *Coel*, that the proceedings in this court where *no forms of proceeding were to be obſerved*, were even more dilatory than in the courts of *Weſtminſter*. (*d*) —It is remarkable, too, that the ſtat. 6 *G.* I. c. 18, which authorizes the eſtabliſhment of the two inſurance companies, expreſsly provides that all actions on the policies of theſe companies ſhall be brought in the courts of *Weſtminſter*. This ſhews that, at that time, the court of policies of inſurance was already fallen into diſuſe, or, what is more probable, that it was fallen into diſrepute, and that thoſe who promoted theſe eſtabliſhments meant to ouſt that court of all juriſdiction in ſuits upon their policies.

From this time, it may be reaſonably ſuppoſed, that all ſuits on policies of inſurance were brought in the courts of common

Common law courts.

(*a*) *Delbye* v. *Proudfoot*, 1 *Show.* 396.—(*b*) *Park*, Introd. 45.—(*c*) Lex merc. 115.—(*d*) 2 *Keb.* 930.

common law; and yet but few queſtions on this ſubject appear to have been determined in the courts of *Weſtminſter* before the middle of the laſt century. Whether this aroſe from the number of inſurances in *England* being inconſiderable, compared to what they have ſince become, or from the parties being ſtill in the habit of ſettling their differences by arbitration, or from both theſe cauſes united, it is not eaſy now to determine. This, however, is certain, that after ſome of the deciſions of the courts of *Weſtminſter*, upon queſtions of inſurance, came to be generally known, the confidence which the juſtice, impartiality, and ability of thoſe courts inſpired throughout *Europe*, ſoon induced the merchants of all countries to prefer *Engliſh* inſurances to thoſe of any other country. Even our enemies, in time of war, were not afraid to rely on *Britiſh* juſtice, and they ſtill continued to cauſe the greateſt part of their inſurances to be effected in *London*, ſuch inſurances being for a long time moſt unaccountably tolerated by the *Britiſh* government. (*a*)

Lord C. J. *Lee.* During the time when Lord Chief Juſtice *Lee* preſided in the court of King's Bench, many caſes came before him which were chiefly decided at *Niſi prius*, but upon ſuch juſt and ſound principles, that very few of them afterwards came before the court for reconſideration.

Lord *Mansfield.* Upon Lord *Mansfield*'s ſucceeding to the ſame high office, upon the death of Sir *Dudley Ryder*, he ſoon found a conſiderable influx of buſineſs to the court of King's Bench, ariſing, in a great meaſure, from the celebrity of his own talents. A great increaſe of inſurances, not only upon *Britiſh* commerce, but likewiſe upon that of other countries, produced, about this time, a number of cauſes upon this ſubject, to which it became neceſſary for him to turn his particular attention; and indeed he ſeems to have taken pleaſure in the diſcuſſion of queſtions ariſing upon this contract, in which, more, perhaps, than upon any other ſubject, he diſplayed the powers of his great and comprehenſive mind. From the books of the common law very little could be obtained: but upon the ſubject of marine law, and the particular ſubject of inſurances, the foreign authorities were numerous, and in general ſatisfactory. From theſe, and

(*a*) See this ſubject fully conſidered *inf.* ch. 2, ſ. 1,

and from the information of intelligent merchants, he drew thoſe leading principles, which may be conſidered as the common law of the ſea, and the common law of merchants, which he found prevailing throughout the commercial world, and to which almoſt every queſtion of inſurance was eaſily referable. Hence the great celebrity of his judgments upon ſuch queſtions, and hence the reſpect they commanded in foreign countries. (*a*)

Many great and important queſtions on the law of inſurance have occurred ſince Lord *Mansfield*'s time, the deciſion of which proves that neither the learning or the talents of the judges of *Weſtminſter Hall*, have been diminiſhed ſince he retired from it. Nothing, indeed, in the hiſtory of the preſent reign, affords a ſtronger proof of his Majeſty's paternal regard for the welfare and happineſs of his people, and of his care of public morals, than the choice of the perſons who have been appointed to fill the high judicial offices in the courts of *Weſtminſter*.

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(*a*) Of this there cannot be a better proof than the following :—*Emerigon*, though not altogether free from national prejudices, after giving an account of the deciſion of the court of King's Bench, in the caſe of *Lavabre* v. *Walter*, concludes with theſe words ;—On ne ſauroit s'empêcher d'admirer cette maniere de procéder, quelque éloignée qu'elle ſoit de nos mœurs ; car l'impreſſion que fait la vertu ſur nous eſt ſi forte, que nous l'aimons juſques dans nos ennemis mêmes. (Ceci etoit écrit en 1781.)—*Tanta vis probitatis eſt, ut eam in hoſte etiam, diligamus. Cic. de amicitia*, c. 9. Les juges en Angleterre ne croient pas, que ſe ſoit aſſez de bien faire ; ils donnent les motifs de leur deciſion, afin qu'on ſache qu'on eſt ſoumis à l'empire de la loi, plutot qu à l'autorité de l'homme. *Emerig.* vol 2, p. 67.

CHAP. II.

Of the Parties to the Contract.

THE parties to the contract of insurance are the insured and the insurer: It will be the business of the present chapter to inquire,

1. What persons may be insured;
2. What persons may be insurers.

Sect. 1.

Vid. c. 3. s. 3.

What Persons may be insured.

IN this country, all persons, whether *British* subjects or aliens, may, in general, be insured. The principal, if not the only exception to this rule is, the case of an alien enemy.

Whether an alien enemy may be insured.

It was long a disputed question, whether, in point of *policy*, the insurance of the property of the enemies of the state, in time of war, ought to be tolerated in this country. This question has, more than once, been agitated in Parliament. In the year 1741, a bill was brought into the House of Commons to prohibit insurances on the ships and effects belonging to the subjects of *France*, then at war with *Great Britain*. The arguments of Sir *John Bernard* against the policy of such a restriction, though answered by Sir *Robert Walpole* and others, by arguments much more cogent and satisfactory, seem to have had greater weight upon that occasion than they merited; for though the bill was committed, it was afterwards dropped.(*a*)

Such insurance occasionally restrained by statute.

In the year 1748, however, a bill was again brought in, to prohibit the insurance of the ships and merchandize of the subjects of *France*, during the continuance of the war with that country. And, though this was strenuously opposed by Sir *Dudley Ryder* and Mr. *Murray*, then attorney and solicitor general, upon what they considered to be

(*a*) Vid. Parl. Deb. published in 1742, Vol. 2. p. 459.

be principles of policy and expedience, yet it paſſed into a law. *(a)* A ſimilar law has been made in the preſent war, by the ſtat. 33 *G.* III. c. 27. ſ. 4. which not only declares ſuch inſurances to be void, but alſo ſubjects the parties concerned in them to three months impriſonment; ſo that, to judge by the opinion of the legiſlature, the *policy* of ſuch a prohibition ſeems to be now pretty well eſtabliſhed.

Whether at common law ſuch inſurance be valid.

Still, however, theſe reſtrictions are only temporary, and therefore it will be proper to inquire how the law ſtands, independently of them.

In every declaration of war is implied a prohibition of all the King's ſubjects to trade with the enemy; or, by the intervention of friends or allies, to convey to them ammunition, proviſions, or any kind of ſuccour. This comprehends, alſo, a prohibition to inſure the effects of the enemy, whether in their own ſhips or in thoſe of neutrals. For, to inſure their property, is, in effect, as I humbly apprehend, nearly the ſame thing as to trade with them.

Opinions of foreign writers on this point.

All the foreign writers agree that this contract cannot be lawfully made between the ſubjects of ſtates at war with each other. *Bynkerſhoek*, who has written a chapter on this very queſtion, (*b*) condemns ſuch inſurances as being contrary both to law and good policy. After defining inſurance, he ſays, '*Præmiſi quemadmodum aſſe-*
'*curatio ſit definienda, ut vel ex definitione conſtaret, rationem*
'*belli omni modo exigere, ne naves, ne merces, ne alia hoſtium*
'*bona liceat aſſecurare. Hoſtium periculum in ſe ſuſcipere,*
'*quid eſt aliud quam eorum commercia maritima promovere.—*
'*Juſtiſſimum id videri poterat, quia in ſingulis belli indic-*
'*tionibus quiſque tantum hoſtibus damni inferre jubetur,*
'*quantum poteſt. Quod ſi ſit, etiam vetatur quoquo modo*
'*hoſtium utilitati conſulere. Id exigit jus belli generale. Sin*
'*aias, ex ejuſmodi aſſecurationibus, plus lucri quam damni ferre*
'*aſſecuratores, adeoque noſtris quam hoſtibus, plus prodeſſe, id*
'*ais, quod eſt incertiſſimum, & de quo vix ipſa experientia*
'*judicare poterit, cum interim ſit certiſſimum, ſic hoſtibus cau-*
'*ſam præberi commercia ſua latius promovendi. Quod, quia*
'*hoſtibus eſt utile, & fere redundat in noſtram necem, omni*
'*ratione prohibendum eſt.*'

Valin,

(*a*) Stat. 21 *G.* II. c. 4.—(*b*) Quæſt. jur. pub. lib. 1, c. 21. —Vid. *Le Guidon*, ch. 2, ſ. 5. *Pothier* h. t. n. 92.

Valin, (*a*) after ſhewing that in *France* the inſurance of enemy's property was contrary to the law of that country, obſerves, in language bordering a little upon deriſion, that the *Engliſh* did not conſider the inſurance of enemy's property as prohibited by a declaration of war :— 'For,' ſays he, 'they conſtantly, during the laſt war, (*b*) 'inſured our ſhips and cargoes, as in time of peace ; 'whether they were deſtined for *France* or her colonies, 'or for the ports of her allies, or thoſe of neutrals: 'That, it is true,' adds he, 'did not prevent our ſhips, 'when taken, being declared good prize ; but the con- 'ſequence was, that one part of that nation reſtored to 'us, by the effect of inſurance, what the other took from 'us, by the rights of war.'

Reaſons of policy againſt ſuch inſurances.

To this obſervation an *Engliſhman* might add, that in every conteſt between theſe rival nations, the naval ſuperiority of *Great Britain*, if not counteracted, muſt, in a ſhort time, ruin the commerce of *France*, provided it be not protected by *Britiſh* inſurances. But, with that protection, the utmoſt they can ſuffer will be the loſs of their premiums ; and this will be more than compenſated by the captures made by their own cruiſers, unleſs they are very unfortunate indeed. Thus will this country loſe one of the greateſt benefits ſhe can hope to derive from her maritime ſtrength. But whatever may be the policy of permitting theſe inſurances, it ſeems that, till lately, a notion has prevailed in this country, and that ſupported by conſtant practice, that ſuch inſurances, when unreſtrained by ſtatute, were not illegal ; (*c*) and the occaſional reſtraint of ſuch inſurances, from time to time by acts of parliament, has been fairly enough called in aid, to ſhew that ſuch was the opinion of the legiſlature, or that the queſtion was, at leaſt, doubtful, when thoſe acts paſſed.

Reaſons of expedience againſt it.

This practice, after all, ſeems to have ariſen in *England*, rather

(*a*) *Valin* h. t. art. 3. p. 32.—(*b*) *Valin* publiſhed his work in 1766, therefore the war he alludes to muſt be that which was terminated by the peace of Paris in 1763.—(*c*) Vid. the opinion of Lord *Hardwicke*, in the caſe of *Henkle* v. *Roy. Ex. Aſſ.* 1 Vez. 320, and that of Lord *Mansfield*, in *Giſt* v. *Maſon*, *Park*, 242, alſo the arguments for the plaintiff in the caſe of *Briſtow* v. *Towers*, 6 T. R. 35.

rather from a notion of policy and expedience, than from any principle of law. Mr. Juſtice *Buller*, in delivering his opinion in the caſe of *Bell* v. *Gilſon* (*a*) ſays;—"In the years 1746 and 1747, Sir *Dudley Ryder*, Lord *Mansfield*, and other great men of that time, argued the queſtion entirely on its expedience, and held that it was good policy to permit inſurances on enemy's property. In later times, I well remember to have ſeen many policies tried profeſſedly on enemy's property, without ever hearing the objection raiſed. Lord *Mansfield* did all in his power to prevent ſo diſhonourable a defence being made. When the caſe of *Giſt* v. *Maſon* (*b*) came on, I more than once converſed with Lord *Mansfield* on the ſubject, being deſirous to obtain his opinion on the legality of ſuch inſurances. On the *legality*, however, I never could get him to reaſon. He often ſaid, that in former times it was conſidered to be for the intereſt of the country to inſure *enemy's property*; and, on this perſuaſion he always *diſcountenanced* any objection on that head. But he never went beyond the ground of *expedience*. *At preſent*, I think ſuch inſurances are not expedient. The ſtate of the countries at war is ſuch as to make them otherwiſe. But the underwriters have taken care that ſuch a caſe as this ſhall never ariſe again; for, from the moment that any one underwriter ſucceeds in this kind of defence, there is an end of inſurances on enemy's property."

Lord *Mansfield's* ſentiments on this point.

From this ſtatement of the learned judge, it is evident that he himſelf doubted, at leaſt, of the legality of inſurances on enemy's property, and that the opinion which he ſo anxiouſly ſought, and which Lord *Mansfield* ſo ſtudiouſly withheld, was, that, *in point of law*, they were void; but that he thought the law of *England* was, in this reſpect, impolitic and unwiſe.—Entertaining this opinion, it was certainly competent to him and Sir *Dudley Ryder*, *as members of parliament*, to argue againſt the policy of the law, when the queſtion was agitated *there*, whether theſe inſurances ſhould be reſtrained by an expreſs ſtatute or not; becauſe every member of parliament has an undoubted right to call in queſtion the wiſdom,

(*a*) 1 *Pul.* & *Bos.* 354, poſt. 34.—(*b*) 1 *T. R.* 84.

dom, or the policy, of any rule of law, when he oppoſes the paſſing of a bill which is meant to enforce the obſervance of it. But to avow or inſinuate that it might, in any caſe, be proper for a judge to prevent a party from availing himſelf of an indiſputable principle of law, *in a court of juſtice*, upon the ground of ſome notion of fancied policy or expedience, is a new doctrine in *Weſtminſter Hall*, and has a direct tendency to render all law vague and uncertain. A rule of law once eſtabliſhed, ought to remain the ſame till it be annulled by the legiſlature, which alone has the power to decide on the policy or expedience of repealing laws, or ſuffering them to remain in force. What politicians call expedience, often depends on momentary conjunctures, and is frequently nothing more than the fine-ſpun ſpeculations of viſionary theoriſts, or the ſuggeſtions of party and faction. If expedience, therefore, ſhould ever be ſet up as a foundation for the judgments in *Weſtminſter Hall*, the neceſſary conſequence muſt be, that as different men muſt often entertain different notions of expedience, that which to-day would be deemed law in one court, might be thought contrary to law to-morrow in another, or even in the ſame court. Indeed the learned judge himſelf has given us an inſtance of this; for he ſays, that *in the preſent war*, he thinks the inſurance of enemy's property *would not be expedient*, and yet he informs us that Lord *Mansfield* was of opinion that it was for the intereſt of the country, *in his time*, to encourage ſuch inſurances.

If a policy be not illegal on the face of it, the court will not grant a new trial, to let in the defendant to ſhew by evidence that the inſurance was upon a trading with the enemy.

In the caſe of *Giſt* v. *Maſon*, alluded to by Mr. Juſtice *Buller*, the court avoided the general queſtion, by refuſing a new trial, which would have enabled the defendants to prove the fact of trading with the enemy.—That was an action for money had and received, brought to recover the premiums upon ſeveral policies of inſurance, underwritten by the plaintiff for the defendants, who were *Weſt India* merchants, and had acted as their own brokers in getting theſe inſurances effected.—Upon the trial of the cauſe, it appeared, that the defendants had property in the *Weſt India* Iſlands, at the time they were captured by the *French*, during the *American* war: That it was a conſtant practice to ſupply theſe iſlands with proviſions from *Ireland*,

Giſt v. *Maſon*, 1 T. R. 84.

land, notwithſtanding they were in the hands of the enemy: And that, in this trade, the defendants had employed neutral veſſels, and had them inſured from different parts of the continent, to *Ireland*, *Madeira* and *Saint Thomas's*, with liberty to go *to any one of the captured iſlands*. —On the part of the defendants, it was contended at the trial, that theſe voyages were illegal; and as both parties were in *pari delicto*, the maxim of law, *melior eſt conditio poſſidentis*, ought to prevail. But Lord *Manſfield*, being of opinion that theſe policies were not illegal *on the face of them*, directed a verdict for the plaintiff. In his addreſs to the jury, he ſaid,—"It is for the benefit of this country to permit theſe contracts upon two accounts; the one becauſe you hold the box, and get the premiums, at leaſt as a certain profit; the other, becauſe it is a certain way of obtaining intelligence of the enemy's deſigns; and I have known inſtances of intelligence procured by ſuch methods." (*a*) The defendants afterwards moved for a new trial, to let them into evidence to prove the nature of this trade, which was ſo notoriouſly illegal, that the plaintiffs muſt have known it to be ſo. And, as an excuſe for not offering this evidence at the trial, it was ſaid that it had been omitted, on a preſumption that the jury, of their own knowledge, muſt have concluded that the illegality of theſe contracts was known to the plaintiff at the time he underwrote the policies. But the court refuſed to grant a new trial. Lord *Manſfield* ſaid,—"This, *upon the face of it*, is the caſe of a neutral veſſel; and it is no where laid down, that policies on neutral property, though bound to an enemy's port, are void. And indeed I know no caſes that prohibit, even a ſubject, trading with an enemy, except two; one a ſhort note in *Roll's* abridgment, (*b*) where trading with *Scotland*, then at war with *England*, was held to be illegal; and the other was a note, which was given me by Lord *Hardwicke*, of a reference in King *William's* time, to all the judges on the queſtion, whether it was a crime at common law, to carry corn to the enemy in time of war; who were of opinion that it was a miſdemeanour. By the maritime law, trading with

(*a*) This addreſs to the jury does not make a part of the caſe in the Term Reports, but is taken from *Park*, 242.—(*b*) 2 *Rol.* Ab. 173.

with an enemy is cauſe of confiſcation in a ſubject, provided he be taken in the act; but this does not extend to a neutral veſſel."

Reaſons againſt the policy of permitting the inſurance of enemies' goods.

Upon this caſe it will be ſufficient to obſerve, that even the arguments of policy urged by Lord *Mansfield*, in his addreſs to the jury, are by no means ſatisfactory. The premiums of inſurance can only be conſidered as a *certain profit*, when there is no poſſibility of loſs, which is repugnant to the very nature of inſurance; nor does it appear that theſe inſurances are likely to afford intelligence of the enemy's deſigns, without affording them, at the ſame time, the means of obtaining much better intelligence of ours. Every perſon concerned in theſe inſurances, muſt be under a ſtrong temptation to convey to the enemy all ſuch information as may put them upon their guard, at leaſt againſt attacks, meditated againſt their trade.—Independent, therefore, of the general queſtion of the illegality of holding any commerce with the King's enemies, it cannot reaſonably be ſuppoſed that the law would tolerate a contract which has ſo ſtrong a tendency to betray a number of perſons into a breach of their allegiance. But be this as it may, two caſes have occurred during the preſent war, in which, though it has not been expreſsly determined that theſe inſurances are illegal, yet it has been decided, that no action can be maintained on any policy, at the ſuit, or on the behalf of an alien enemy, at leaſt during the war, whether the inſurance be made before or after the commencement of the war, and though the goods inſured be of *Britiſh* manufacture, and ſhipped before the war began. Theſe caſes, independently of any parliamentary reſtraint, muſt in future throw a great impediment, at leaſt, in the way of ſuch inſurances.

An alien enemy cannot maintain an action on a policy on goods, though they were ſhipped before the war commenced. Nor can an agent of ſuch inſured maintain the action, though he be a creditor of the inſured for

The firſt of them was an action on a policy upon goods on board the *Greyhound*, an *American* ſhip, effected before the paſſing of the ſtat. 33 *G.* III. c. 27, "at and from *London* to *Bayonne*."—It was averred in the declaration, that the policy was effected on account of certain perſons therein named, who were intereſted in the goods, and that the ſhip was captured by the *Engliſh*.—The defendant pleaded firſt, that the perſons intereſted were aliens, born in *France*, within the allegiance of the *French* King; that before the

ſhip

ſhip ſailed, a war broke out between the King of *Great Britain* and the perſons exerciſing the powers of government in *France*; that the perſons intereſted were inhabiting and commorant in *France*, under the government there; and that they were enemies of our King, and adhering to his enemies, &c.—*Secondly*, That the defendants were *living in France*, and enemies of the King; and that the goods were ſent from *London*, after the commencement of the war, for the purpoſe of being landed in *France*, and delivered in a courſe of trade to the King's enemies.—To the firſt of theſe pleas, the plaintiffs replied, That the perſons intereſted were indebted to them in more than the value of the goods inſured; and to the ſecond, That the goods were not prohibited at the time when the policy was effected, and that they were ſhipped before the commencement of the war.—Upon demurrer to each of theſe replications, the court gave judgment for the Defendant, being *clearly of opinion*, that no action whatever could be maintained by, or in favour of, an alien enemy.—Lord *Kenyon* ſaid, "that the caſe of *Anthon* v. *Fiſher*, (*a*) proceeded on the ſame principle: That there was no caſe in which the action had been ſupported in favour of an alien enemy; for though it was held in *Ricord* v. *Bettingham*, (*b*) that the action by an enemy on a ranſom bill might be maintained, the action was not brought till peace was reſtored."

more than the ſum inſured.

Brandon v. *Nefbitt*, 6 T.R. 23.

The inſurance, in this caſe, having been made before the commencement of the war, was perfectly legal; and the inſured only failed in their action on account of their temporary diſability to ſue. And it would ſeem, from theſe latter words of Lord *Kenyon*, that upon the return of peace, they might have maintained their action.

In the other caſe, it appeared that the plaintiff, as agent, in purſuance of directions for that purpoſe, cauſed an inſurance to be made on account of *Arrouet* and others, ſubjects of *France*, on goods, conſiſting of *Britiſh* manufactures, ſhipped on board the *Nancy*, an *American* veſſel, on the 19th of *March*, 1793: That previous to the inſurance and ſhipping of the goods, general repriſals were granted againſt *France*, and an embargo laid on all foreign veſſels,

Neither can an action be maintained on a policy on the property of an alien enemy, though of *Britiſh* manufacture exported from hence.

Briſtow v. *Towers*, 6 T.R. 35.

(*a*) *Doug.* 648, 9, n.—(*b*) 3 *Bur.* 1734, 1 *Bl.* 563.

veſſels, except thoſe belonging to ſtates in amity with the king, not having naval or military ſtores, or any other prohibited articles on board: And that the ſhip having ſailed on her voyage, was captured by the *Engliſh*, and the goods inſured condemned as *French* property.—Upon this caſe, which came before the court of King's Bench upon a ſpecial verdict, ſtating the above facts, the court held clearly that it could not be diſtinguiſhed from the above caſe of *Brandon* v. *Neſbitt*, and therefore gave judgment for the defendant.

Here, the inſurance being on property belonging to perſons who were in the ſituation of alien enemies at the time the policy was effected, afforded an opportunity of deciding the general queſtion. But though the objection was made and fully argued, yet, according to the report of the caſe, the court expreſſed no opinion on that point, but gave judgment for the defendant, without ſtating any other ground than that it could not be diſtinguiſhed from the foregoing caſe of *Brandon* v. *Neſbitt*.—But as the ground of the deciſion in that caſe was not, that the contract was *void*, but merely that an action could not be maintained at the ſuit of an *alien enemy*, the general queſtion ſtill remains undecided.

But the following caſe ſhews, that a neutral, though reſiding in the enemy's country, and carrying on trade there, and even in partnerſhip with an alien enemy, may inſure his intereſt in the joint property.

A neutral reſiding in the enemy's country, and carrying on trade there in partnerſhip with an alien enemy, may inſure his intereſt in the joint property.

Rotch. v. *Edie*, 6 T. R. 413, *inf.* c. 12. ſ. 4.

An inſurance was made on the one half of a ſhip, &c. at and from *L'Orient* to the ſouthern whale fiſhery.—In an action brought to recover a loſs by the detention of the *French* government, it appeared that the inſured was a ſubject of the *United States of America*, and had formerly reſided ſeveral years in *London*, but for ſome years previous to the making of the inſurance in queſtion, had dwelt at *L'Orient*, and was jointly concerned in the ſouthern whale-fiſhery, with *M. Berard*, a native of *France*, reſident at *L'Orient*, but their intereſts were inſured by ſeparate policies, effected by ſeparate agents. The plaintiff, ſhortly before making the inſurances in queſtion, came to *England*, and returned to *France* previous to the commencement of hoſtilities with *Great Britain*; and, having remained

mained there about four months, returned again to *England*, and continued to reſide there from that time.—It was inſiſted, on the part of the defendant, that, as the inſured, at the time the inſurance was made, was domiciled, and carried on trade in *France*, and owed a temporary allegiance to the governing power of that country, the objection applied as ſtrongly to his recovering, as if he were a natural born ſubject of that country. But the court determined, that the plaintiff, not being an alien enemy, but a native of *America*, and then reſiding in *England*, was under no diſability to ſue in this caſe; and that the conſequence of allowing this objection would be, to render it illegal to inſure the property of neutrals in an enemy's port.

Sect. 2.

What Perſons may be Inſurers.

Underwriters.

INSURANCE is a ſpecies of game which requires great prudence and circumſpection in thoſe who are engaged in it as underwriters. They ſhould be expert in analyzing riſks and calculating probabilities; in foreſeeing the dangers of the ſea, and the danger of fraud. They ſhould be able to form a ſound judgment by combining all circumſtances, and comparing them with the rate of premium. To form ſuch a judgment, in many caſes requires great ſagacity, penetration, and experience. But if men poſſeſſing all theſe advantages are ſometimes deceived, what muſt be the ſituation of thoſe, who, allured by the deſire of gain, blindly put their ſignatures to every policy that is preſented to them, without conſidering the precipice, to which their temerity leads them. A wiſe underwriter will judge for himſelf, and not implicitly follow others who may have ſubſcribed before him, however remarkable for ſagacity and experience. (*a*)

Character of the *French* underwriters.

In *France*, the underwriters, if we may credit ſome of the beſt *French* authors of that country, were never remarkable for their readineſs to do juſtice to the inſured. They are accuſed

(*a*) Pondera ſe i firmati poſſino eſſere delſino da indurre altri, *Targa*, c. 52, n. 33.

accuſed of reſorting to captious exceptions and fraudulent ſubterfuges to elude the payment of their loſſes.(a) *Aſſecuratores plerúmque differendæ ſolutionis gratiâ, nodum in ſcirpo quærunt.(b)*

Character of the *Engliſh.*

With us, if there are a few underwriters, who, under the guidance of ill adviſers, ſometimes ſet up unworthy objections, there are many who are the victims of their own good faith and eaſy credulity.(c) The moſt cautious find it extremely difficult to eſcape the ſnares which knavery prepares for them. No wonder, then, if they are ſometimes tempted to make captious exceptions, when it is conſidered that they can only ſee with the eyes of the inſured, that, in general, they can only defend themſelves by ſuch papers, and other ſcraps of evidence as they can obtain from the ſame quarter; and that, with all the precautions they can employ, they often pay what they might juſtifiably diſpute.

The two inſurance companies erected by the 6 *G.* 1, c. 18.

At common law, any man, or company of men, might be inſurers; and individuals, upon their own ſeparate account have ſtill the ſame right.—But, it was ſuppoſed, about the beginning of the preſent century, that commerce had ſuffered conſiderably by perſons in inſolvent circumſtances underwriting policies of inſurance; and having received large ſums in premiums, becoming bankrupts, or otherwiſe failing in making good their loſſes. To remedy this, but more, perhaps, to enable government to raiſe a ſum of money by the ſale of a monopoly, it was thought expedient to erect two companies for the purpoſe of making marine inſurances, with ſuch funds to anſwer all demands on their policies, as might give confidence to ſuch mercantile adventurers as were unwilling to depend on individual underwriters; ſtill, however, leaving to merchants the option of inſuring with ſuch underwriters when they thought proper. To this end, the ſtat. 6 *G.* I. c. 18. authoriſed the King to grant charters to two diſtinct companies or corporations for

(a) Vid. *Emerig.* vol. 2, p. 244.—On les a comparés aux femmes qui conçoivent avec plaiſir, & qui enfantent avec douleur.

(b) *Straccha* gl. 29. n. 1.—(c) Modernis his temporibus, quibus fraudes à *navarchis* frequentius committuntur, digni potiùs miſeratione cenſeri debent aſſecuratores, quam aſſecurati. *Caſarigis*, diſc. 11, n. 3.

for the inſurance of ſhips, goods and merchandizes at ſea, or going to ſea, and for lending money on bottomry. They were to be inveſted with all the powers uſually granted to corporations, and the privilege of purchaſing lands to the amount of 1000l. *per annum*. Each was to provide a ſufficient capital, and a competent ſtock of ready money, to anſwer all demands on their policies.

A charter granted to each, 22d of *June*, 1720.

In purſuance of the powers given by this act, the two propoſed companies, the one called the *Royal Exchange Aſſurance*, and the other, the *London Aſſurance*, were eſtabliſhed by Royal charter, bearing date the 22d day of *June*, 1720.

All other companies are reſtrained from inſuring ſhips and goods at ſea, or lending money on bottomry.

But the moſt important privilege granted by this act to theſe companies was the excluſive right of making marine inſurances, and lending money on bottomry, as a *company or partnerſhip*, on a *joint capital*. For this purpoſe the act (ſect. 12) declares that, 'during the continuance of theſe 'corporations reſpectively, all other corporations then in 'being, or afterwards to be eſtabliſhed, whether ſole or 'aggregate, and all ſocieties and partnerſhips for inſuring 'ſhips and merchandizes at ſea, or going to ſea, and 'for lending money on bottomry, ſhall be reſtrained from 'granting, ſigning, or underwriting, any policies of inſur-'ance upon any ſhips, goods, or merchandizes, at ſea, or 'going to ſea, and from lending money on bottomry: And 'that if any corporation or perſons in partnerſhip, (other 'than the ſaid two companies,) ſhall preſume to grant, 'ſign, or underwrite any ſuch policy, or make any ſuch 'contract of inſurance, every ſuch policy ſhall be *ipſo* '*facto* void; and all ſums, ſo ſigned and underwritten, 'ſhall be forfeited, one moiety to the King, the other 'to the informer, who ſhall ſue for the ſame in any of 'the courts of *Weſtminſter*. And if any ſuch corpora-'tion or partnerſhip, (other than the ſaid two compa-'nies reſpectively,) ſhall lend or agree to lend, any money 'on bottomry, the bond, or other ſecurity for the ſame, 'ſhall be void, and ſuch agreement adjudged to be an 'uſurious contract, and the offenders ſhall ſuffer as in 'caſes of uſury. Nevertheleſs, it is declared, that any 'private

And all policies made by any ſuch company ſhall be void, and the ſums underwritten forfeited.

And all bottomry bonds deemed uſurious.

But the right of individual inſurers continues as before the act.

'private or particular perſon or perſons ſhall be at liberty to underwrite any policies, and engage in any inſurances, upon ſhips, goods, or merchandizes, at ſea, or going to ſea, or may lend money on bottomry; ſo as the ſame be not upon account or riſk of any corporation, company, or partnerſhip.' (*a*)

A learned author on the ſubject of inſurance, thinks that this monopoly was injudiciouſly granted to theſe two great companies. (*b*) But it muſt be owned that from the time this grant was made, down to the preſent day, theſe companies have conducted themſelves with the utmoſt liberality, and have carried on their buſineſs with equal credit to themſelves, and advantage to the commercial world.

The privileges of the *East India* and *South Sea* companies reſerved.

The rights and privileges of the *East India* and *South Sea* companies, which they enjoyed before, are reſerved and ſecured to them by this act, except as to the inſurance of ſhips and merchandize.

Contracts made in derogation of the rights of the inſurance companies are illegal and void.

The object of the 12th ſection of the act was, not only to reſtrain avowed partnerſhips from making inſurances publickly in their partnerſhip names, but alſo to ſecure to theſe companies the excluſive right of inſuring ſhips and goods at ſea, *as a company upon a joint capital*, by making it illegal to employ any other joint ſtock in this ſpecies of inſurance. And the following caſe will ſhew, that no contract ariſing out of any agreement made in derogation of this right can be legal or binding.

A. and B. are jointly engaged in inſurances in the name of A.; and A. pays more in loſſes than he receives in premiums, and both become bankrupts.—A.'s aſſignees ſhall not recover from thoſe of B. a moiety of the money thus advanced.

Mitchell v. *Cockburn*, 2 H. Bl. 379.

A. and B. were jointly engaged in the buſineſs of inſurance, which was carried on in the name of A., and became bankrupts.—A. having paid much more for loſſes than he had received in premiums, his aſſignees brought an action againſt the aſſignee of B. to recover

(*a*) This excluſive privilege of making marine inſurances upon a joint capital was expected to prove ſo profitable to theſe companies, that as the price of the conceſſion, they agreed to pay 600,000l. to diſcharge the debts of the civil liſt. But they very ſoon diſcovered that they had agreed to purchaſe this monopoly at too high a price; for by the 7 *G.* I. c. 27, ſ. 26, it appears that 188,750l. of the quota of each company remained unpaid, which ſum, on account of the difficulties they then laboured under, was remitted to them.

(*b*) Vid. *Millar*, 13.

recover a moiety of the money thus advanced.—Upon the trial before Lord C. J. *Eyre*, the plaintiffs were nonſuited; his Lorſhip being of opinion, that, this demand ariſing out of a partnerſhip prohibited by the ſtat. 6 *G.* I. c. 18, no action could be maintained for it.—Upon a motion to ſet aſide this nonſuit, it was contended on the part of the plaintiffs, that the object of the ſtatute was to prevent a competition between the inſurance companies and any other *open and oſtenſible partnerſhips*, which might gain credit in oppoſition to the companies; but here only one individual appeared, on whoſe ſingle ſecurity the inſured relied.—But the court were unanimouſly of opinion that the nonſuit was right; for the proviſions of the act would be at an end if a perſon, by inſuring in his own name, could have the benefit of a joint capital, which the act expreſsly prohibits, though the party ſubſcribing ſhall be eſtopped from ſetting up a ſecret partnerſhip to defeat a *bonâ fide* inſurance.

A., an underwriter, pays a loſs, and B. his ſecret partner pays his ſhare to the broker for the uſe of A.;—A. cannot maintain an action to recover this money from the broker.

So, where an underwriter paid the whole loſs upon a policy, and one *Briſtow*, who had agreed to divide the riſk with him, alſo paid his moiety to the broker.—The underwriter brought an action againſt the broker for this money, as being money received by him from *Briſtow* to his uſe.—Lord *Kenyon*, who tried the cauſe, was clearly of opinion, that this was a partnerſhip within the act of parliament; and held that the underwriter could not maintain an action againſt the broker to recover the moiety ſo paid to him by *Briſtow*, and nonſuited the plaintiff.—"If," ſaid his Lordſhip, "a ſingle name appear upon the policy, as in this caſe, the inſurer ſhall never be allowed, if a loſs happen, to defeat a *bonâ fide* inſurance, by ſaying to an innocent perſon, that there was a ſecret partnerſhip between himſelf and another, ſo as to avoid the policy. But here the plaintiff is himſelf the underwriter, who comes to enforce an illegal contract: It is a partnerſhip *pro hâc vice*; and this party cannot apply to a court to enforce a contract founded in a breach of the law."—No motion was ever made to ſet aſide this nonſuit; and Lord *Kenyon*, ſome time after, took occaſion to mention to the bar, that he had ſtated the caſe to the reſt of the judges of

Sullivan v. *Greaves*, at N. P. after Eaſt. 1789, *Park* 8.

of the court, who all concurred with him in the opinion he had given.

Nor can the oſtenſible underwriter, on the ground that the partnerſhip was illegal, recover from the broker the profits of ſuch partnerſhip inſurances.

Upon the ſame principle which governed theſe two caſes, it has alſo been determined that an action cannot be maintained on behalf of the oſtenſible underwriter, againſt the broker who managed the inſurances of a partnerſhip, to recover a balance in his hands ariſing from the profits of thoſe inſurances, even upon the ground that the partnerſhip was illegal, and the oſtenſible underwriter the ſole inſurer.

A. B. and D. become partners as underwriters, in the name of A.—C. and D. receive the premiums as inſurance brokers. A. cannot diſaffirm the partnerſhip by inſiſting that he alone was the inſurer, ſo as to recover from C. and D. the money received by them for A. B. and D.

Booth v. *Hodgſon*, 6 T. R. 405.

Thus: A. and B. were partners, as merchants; and C. and D. were partners, as inſurance brokers: A. B. and D. agreed to become partners as underwriters; but the name of A. only was to be uſed. Policies were, from time to time, ſubſcribed in the name of A. ſometimes by himſelf, ſometimes by D., and premiums were received, which, (after deducting loſſes, &c.) amounted to £.2455 17*s.* 1*d.* A. and B. employed C. and D. as brokers, to get inſurances effected for them, and became indebted to them in £.2269 11*s.* 5*d.* for premiums.—A. became bankrupt, and his aſſignees brought an action againſt C. and D. to recover the above ſum of £.2455 17*s.* 1*d.* as money had and received by them to the uſe of the bankrupt.—Upon this caſe, the queſtion for the opinion of the court was, whether the plaintiffs were entitled to recover the whole ſum of £.2455 17*s.* 1*d.* as the net profit of the inſurances made in the name of A.; and if ſo, whether the defendants had a right to ſet off the £. 2269 11*s.* 5*d.*—It was inſiſted on the part of the plaintiffs, that, though the partnerſhip between A. B. and D. as underwriters was illegal and void, and to be laid out of the caſe, yet the inſurances were not ſo; and it would be unjuſt, that, where the inſured had had the benefit of the policies, the inſurer ſhould be liable to the riſk, and yet not be entitled to the premiums: That as the money muſt be conſidered as actually received by the defendants as brokers for A. *only*, they ought not to object to paying it to his aſſignees on account of an illegal contract between him and others.—But the court were unanimouſly

of

of opinion, that the plaintiffs were not entitled to recover any thing.—They ſaid, that the object of the ſtat. 6 *G.* I. c. 18. was to protect the two companies from any competition with other companies formed into partnerſhips; and it enacted that all policies contrary to theſe proviſions ſhould be void: But, that it was only void as between the inſurer and his ſecret partners, not as between him and the inſured, who knew nothing of the partnerſhip: That, as the plaintiffs, however, avowed that the bankrupt had inſured in direct violation of the ſtatute, and as all their claim aroſe out of this illegal tranſaction, the law could give no effect to it: That, as to the money being received by the defendants to the uſe of A. only, that was an inference contrary to the fact; for they received it for the uſe of the partners in an illegal partnerſhip; and, as between A. and his partners, the plaintiffs could not be ſuffered to diſaffirm the partnerſhip. They conſidered the foregoing caſes of *Sullivan* v. *Greaves*, and *Mitchell* v. *Cockburne*, as clear authorities in favour of the defendants.

It is obſervable that though the ſtatute declares that every policy ſubſcribed by any other partnerſhip than the two companies ſhall be *ipſo facto* void; yet in each of the three foregoing caſes, it was diſtinctly declared that though theſe partnerſhip contracts were void, as between the partners themſelves, yet that, as between the underwriter and the inſured, who knows nothing of the partnerſhip, they are good and binding. This, indeed, muſt have been the meaning of the legiſlature. Therefore, if a ſingle name appear upon the policy, the perſon who ſubſcribed it ſhall never be allowed, if a loſs happen, to defeat a *bonâ fide* inſurance, by ſaying to an innocent perſon, that there was a ſecret partnerſhip between him and another, ſo as to avoid the policy.

Though ſuch contracts are void, as between the ſecret partners, they are not ſo as between the underwriter and an innocent inſured.

But the rigour of the principle which governed the court, in the deciſion of the three foregoing caſes, ſeems to have been, in ſome degree, relaxed in the two following ones, in which it appears to have been the opinion of Lord *Kenyon*, and the court of *King's Bench*, that inſurances may

Yet inſurances may be legally made upon a joint capital, provided each ſubſcriber be not liable for the whole.

may be legally made upon a joint capital, provided each ſubſcriber to it be only liable to the amount of his ſubſcription, and not each for the whole.

A number of ſhip owners ſubſcribe a ſum proportioned to their ſhipping, to a common ſtock which becomes a fund for the payment of all loſſes: As each individual is only liable for the ſum he undertakes, and not each for the whole, the policy ſo underwritten is not illegal.

The firſt caſe I ſhall mention, though not the firſt in point of time, was an action on two policies of inſurance on the *Ann* and *Elizabeth*, from *Dantzic* to *London*.—The plaintiff and defendant were members of the "*Whitby* "Aſſociation," conſiſting of a number of perſons, owners of ſhips, each of whom in proportion to his ſhipping, paid a certain ſum, which formed the ſtock of the ſociety. The policies were ſigned by all the members. All inſured for each other, according to the reſpective values of their ſhips; and when any loſs happened, the treaſurer paid it out of the joint ſtock. The defendant's ſhare of the preſent loſs was 14 l. Each individual was only liable for the ſum he had undertaken.—On the part of the defendant it was objected, that the policies were void in law, as being againſt the ſtat. 6 *G.* I. c. 18.—But Lord *Kenyon*, before whom the cauſe was tried, over-ruled the objection.—He ſaid,—"This does not infringe on the act of Parliament, as the members of the aſſociation have only underwritten in their individual characters: But they cannot underwrite for themſelves and partners. If all of them were liable to the extent of their whole ſtock, it would be illegal. At preſent the members of this aſſociation only ſtand as individual underwriters for ſmall ſums."—The cauſe was at laſt referred, to inquire whether the money paid into court was ſufficient to cover the loſs.

Harriſon v. *Millar*, at N. P. after *Mich.* 1796, 7 T. R. 340. n. *Eaſt.* Rep. 513.

But if all the members agree to make good the deficiency, in caſe any become inſolvent, the agreement is void.

But if, in ſuch caſe, the ſubſcribers to ſuch an aſſociation agree that, in caſe of the inſolvency of any of the members, his ſhare of any loſs ſhall be made good by the other ſubſcribers, the contract will be void; this being the very ſpecies of joint inſurance which the ſtatute meant to prohibit.

A company agree to inſure each other's ſhips, and covenant *ſeverally*, and not jointly, to pay in caſe

As, where articles of agreement were executed by a number of perſons, deſcribing themſelves to be owners and part owners of ſhips, who had agreed to become a company or ſociety for the inſurance of ſhips, and who covenanted

venanted with a truſtee for themſelves *ſeverally*, and not jointly, that they would ſeverally engage and bind themſelves for the inſurance of ſhips, and parts of ſhips, belonging to the ſeveral parties, along with their own ſeveral and reſpective parts of any ſhips, from the 1ſt of *June* 1787 for 21 years, ſubject to certain conditions and regulations, &c.: That in caſe of a total loſs of any ſuch ſhip, the ſubſcribers covenanted *ſeverally* to pay their reſpective proportions of the ſum of 1000 l. to the perſon who ſhould have entered, and inſured ſuch ſhip; and one regulation was, "That in caſe any member of the company ſhould become inſolvent, or unable to pay a proportionable part of any loſs that might happen, *the proportionable part of ſuch inſolvent member ſhould be made good by the other members*; and that all coſts, charges, and expenſes of any action brought, or defended, by order of the committee, *ſhould be borne and paid equally by the reſpective members.*"—In an action of covenant brought on theſe articles by one of the ſociety againſt the truſtee, the court of *King's Bench*, upon demurrer, determined that the action could not be maintained, the articles of agreement being void by the ſtat. 6 *G.* I. c. 18. ſ. 12.—Lord *Kenyon* ſaid,—"That the meaning of the legiſlature, in paſſing that act, was, that, as the two inſurance companies were to have a monopoly up to a certain extent, in conſideration of certain ſums of money paid by them to the public, there ſhould be no competition between them and any other public body; but that private individuals might ſtill continue to inſure on their own account: That the caſe of *Harriſon* v. *Millar*,(*a*) ſeemed to have been properly decided. There, each perſon undertook for himſelf only, according to the value of his own ſhare: But here, in caſe of the inſolvency of any one of the members, all the others were liable to make good his ſhare of the loſs: That this was adding the credit of the reſt of the members of the ſociety, which was the very thing that the act intended to prevent.

of loſs, in proportion to their reſpective ſhares; but in caſe of the inſolvency of any, the others to make good the deficiency: This is void by the ſtatute.

Lees v. *Smith*, 7 T. R. 338.

CHAP.

(*a*) Sup. 46.

CHAP. III.

Of the ſubject matter of marine inſurances.

HAVING ſhewn in the foregoing chapter what perſons may be parties to this contract, we now proceed to conſider the *ſubject matter* of it.

Inſurances are moſt commonly made on goods and merchandize, ſhips, freight, and bottomry loans. But there are certain articles, which, from motives of public policy, cannot be legally inſured in this country, and others which can only be inſured under particular reſtrictions. It will be the buſineſs of the preſent chapter to particularize theſe, and to ſhew by what laws, and under what circumſtances, the inſurance of them is regulated or reſtrained. This may be done under the following heads, viz.

1. Smuggled goods;
2. Prohibited commerce with the *Britiſh* colonies;
3. Warlike ſtores ſent to the enemy;
4. Goods bought of the enemy;
5. The wages and effects of the captain and ſailors;
6. Freight;
7. Slaves;
8. Profit.

Sect. 1.

Smuggled goods.

An Inſurance on prohibited commerce is void.

In general it may be laid down as a rule, that no inſurance can be made on any ſpecies of goods and merchandizes, intended to be imported or exported, contrary to the laws of this kingdom, or thoſe of its dependencies, or the law of nations; and that if the intended commerce be contrary to any of theſe laws, an inſurance made to protect it will be illegal and void. For the law would be inconſiſtent with itſelf, were it to give validity to a contract which is meant to protect a party from the riſks

riſks attending an infringement of the law. The ſame principle prevails in all other maritime ſtates; and foreign writers, particularly the *French*, lay it down as a rule, that the promiſe of the inſurer, however generally expreſſed, will not comprehend the caſe of any commerce prohibited by the law of the place where the contract is made. (*a*)

The inſurer may take advantage of this objection, though he knew the trade to be illegal.

And, with us, this rule holds, even where the inſurer is appriſed of the nature of the trade: For though the objection, in ſuch caſe, muſt always come with an ill grace from an inſurer who has accepted the premium, and promiſed the indemnity; yet the courts are bound to allow the objection; not, indeed, for the ſake of the inſurer, but in obedience to the law, which is founded on general principles of policy, and, of which, by a ſort of accident, the inſurer is permitted to take advantage, contrary to the real juſtice of the caſe, as between him and the inſured. (*b*)

Opinions of foreign writers on this point.

Roccus does not ſeem to have underſtood that this objection was founded in *public policy*, for he conſiders it as a diſcharge of the inſurer, only where he has had no *notice* of the illegality of the trade. (*c*) But *Bynkerſhoek*, with more enlarged notions of juriſprudence, puts this matter upon its true ground. (*d*) He holds that the contract is void, though the goods inſured be expreſsly ſtated to be contraband.

Goods

(*a*) Vid. *Roccus*, n. 21, *Le Guidon*, ch. 2, art. 2 & 5, *Cleirac*, p. 233. *Valin* ſur art. 49, h. t. p. 127, *Pothier*, h. t. n. 58. *Emerig.* tom. 1, p. 211. Vid. alſo *Molloy*, b. 2, c. 7, ſ. 15.—(*b*) Vid. Lord *Mansfield*'s judgment in *Holman* v. *Johnſon*, *Cowp.* 343.—(*c*) "Aſſecuratiò facta, quantumvis generalis, non comprehendit res vetitas aſportari; et quando dominus mercium aſſecuratarum devehi fecerit res prohibitas, *ignorante aſſecuratore*, cujus cauſâ pervenitur ad perditionem mercium vel navis,—non tenetur aſſecurator."—*Roccus*, h. t. n. 21. *Santerna*, parts 4, n. 17, uſes the ſame words; *ignorante aſſecuratore*.—(*d*) "Si vel nominatim expreſſum ſit *contrabanda*, vel res hoſtiles, aſſecurari, ne ſic quidem aſſecuratorem teneri, *quia nullus eſt contractus*, et contractus qui nullus eſt, implere vel non implere, pendit a mera voluntate contrahentium. Quod autem meræ voluntatis eſt in judicio defendi nequit." *Byńk.* quæſt. jur. pub. lib. 1, c. 21.

What is meant by contraband and ſmuggled goods.

Goods are ſaid to be prohibited or contraband, when the importation or exportation of them is abſolutely forbid by law, from motives of commercial policy. Such are many foreign manufactures, the importation of which is wholly prohibited, with a view of encouraging ſimilar manufactures of our own. The exportation of wool, and other raw materials, tools, and machinery employed in manufactures, is alſo prohibited from ſimilar motives. Moſt other articles of commerce are allowed to be imported or exported, ſubject to certain duties or cuſtoms; and when prohibited goods, or goods on which the duties have not been duly paid, are attempted to be imported or exported, they are uſually called *ſmuggled*, or *run goods*.

By 4 and 5 *W.* and *M.* c. 15, perſons inſuring the delivery of ſmuggled goods, and alſo the inſured, ſhall forfeit £.500.

But the mere illegality of the contract has, in many inſtances, been found inſufficient to prevent great frauds from being committed againſt the revenue, and againſt the prohibitory reſtrictions above alluded to, by perſons who, for certain premiums, made it a practice to undertake, at their own riſk, to deliver ſmuggled and contraband goods into the warehouſes of the owners, free from duty; thus becoming, not only the carriers, but the *inſurers*, likewiſe, of ſuch goods, even againſt the riſk of ſeizure and confiſcation. To remedy this evil, the ſtat. 4 and 5 *W.* and *M.* c. 15. ſ. 14, provides, 'That all perſons, who, by way of inſurance or otherwiſe, ſhall undertake to deliver any goods imported into *England*, without paying the duty, or any prohibited goods; or ſhall, in purſuance of ſuch inſurance or agreement, knowingly deliver any prohibited or uncuſtomed goods, ſhall, for every offence, forfeit £.500, above all other forfeitures.'—The ſame penalty is impoſed on perſons who ſhall agree to pay for ſuch inſurance, or knowingly receive ſuch goods.—'And if the inſurer ſhall diſcover the ſame, he ſhall keep the inſurance money, be diſcharged from all forfeitures, and have half the penalties impoſed on the party inſured or receiving the goods. If the inſurer do not make ſuch diſcovery, the party inſured may do ſo, and he ſhall have back his inſurance money, and half the penalties impoſed on the inſurer, and be diſcharged from his own forfeitures.'—And the ſtat. 8 and 9 *W.* and *M.*

Encouragement to either party to inform againſt the other.

M. c. 36, made for the encouragement of the ſilk manufacture, ſubjects all perſons guilty of delivering foreign alamodes and luſtrings to be *held to bail* for the penalties impoſed by the above act of the 4 and 5 *W.* and *M.* c. 15.

In ſome caſes the ſmuggler may be held to bail.

In like manner, it became a practice with perſons engaged in the clandeſtine exportation of wool from *Great Britain* to foreign parts, to inſure the delivery of it to the conſignee. To reſtrain this pernicious practice, the ſtat. 28 *G.* III. c. 38. ſ. 45 and 9. declares, 'That if any perſon, by way of inſurance or otherwiſe, ſhall undertake or agree that any ſheep, wool, &c. ſhall be carried to 'parts beyond the ſeas, from any place within this king-'dom; or, in purſuance of ſuch inſurance, ſhall deliver 'any wool, &c. in parts beyond the ſeas, ſuch perſon, 'and all aiders and aſſiſtants, ſhall, upon conviction, for-'feit 50 l., and ſuffer ſix months ſolitary impriſonment.' And (by § 46.) the like puniſhment is awarded againſt perſons 'who ſhall pay, or agree to pay, for ſuch inſurance,' and the articles inſured ſhall be forfeited. 'And (by § 47.) 'any perſons, concerned in ſuch inſurance, who ſhall 'inform againſt the others, ſhall be freed from all penal-'ties, and be entitled to the things inſured.' 'And '(by § 48.) all inſurances on goods and merchandizes to 'be exported from *Great Britain* to foreign parts, which 'ſhall afterwards appear to be wool, &c. ſhall be void, 'notwithſtanding any words or agreement inſerted in the 'policy; and nothing ſhall be recovered for any loſs or 'damage, or for the premium upon ſuch inſurance.'

Penalties for inſuring the delivery of wool in foreign parts, or paying for ſuch inſurance.

When the inſurance is on goods generally.

Whether a trade prohibited by the laws of one country may be the ſubject of a legal inſurance in another, is a queſtion upon which there has been ſome difference of opinion amongſt writers on the law of inſurance.—*Valin* (*a*) ſupports the affirmative, and ſays, that though an inſurance on goods, the importation or exportation of which is prohibited by the laws of *France*, is void; yet, when the prohibition is by the laws of another country, if the inſurer be appriſed that the goods inſured are contraband, he is bound by the contract: If he be ignorant of this, it is

Whether a trade prohibited in one country may be the ſubject of a legal inſurance in another.

(*a*) Art. 49, p. 127.

is agreed on all hands that he would not be bound, for he could not be ſuppoſed to ſubject himſelf to the riſk of ſeizure and confiſcation, unleſs he had notice that the goods were contraband, and received a premium adequate to the nature of the riſk. In ſupport of this opinion he cites a ſentence of the admiralty of *Marſeilles* confirmed by an *arrêt* of the Parliament of *Aix* of the 30th of *June* 1758, where the inſurance was upon raw ſilk meant to be ſmuggled out of *Spain*. This ſentence was founded upon a *conſultation*, or written opinion, of *Emerigon*, who labours to prove that goods may be inſured in *France*, which are contraband only with reſpect to foreign countries, provided they are not ſo by the laws of *France*. "The exportation of certain goods," ſays he, "may be prohibited by his *Catholic Majeſty* as ſtrictly as he pleaſes; but his laws are no rule of conduct for *Frenchmen*, who are unqueſtionably permitted in *France*, to import bullion, coin, ſilk, &c. from *Spain*, to ſupply our coinage, our manufactures, and our commerce." *Pothier*, (*a*) who is generally ſwayed by purer moral ſentiments, combats this doctrine, and inſiſts that the grounds of it are falſe. His principal arguments are, that a man cannot carry on a contraband trade in a foreign country without engaging the ſubjects of that country to commit an offence againſt the laws, which it is their duty to obey; and it is a crime of moral turpitude to engage a man to commit a crime: That a man carrying on commerce in any country, is bound to conform to the laws of that country; and, therefore, to carry on an illicit commerce there, and to engage the ſubjects of that country to aſſiſt him in ſo doing, is againſt good faith, and conſequently a contract made to favour or protect this commerce, is peculiarly unlawful, and can raiſe no obligation.—By way of anſwer to theſe arguments, *Emerigon* (*b*) ſays, that *Pothier* would not have been ſo rigid, if he had conſidered that ſmuggling is a vice common to all commercial nations. That the *Spaniards* and *Engliſh*, in time of peace practiſe it againſt *France*; and

(*a*) *Pothier* h. t. n. 58.—(*b*) Vol. I. p. 212, 215.

and that the *French*, therefore, have a right, by way of repriſals, to do the ſame towards them; and this he ſays, is ſupported, not by the *authority* of the law, but by the *evaſion* of it.

So that, according to *Emerigon*, the *law* is conformable to *Pothier*'s ſentiments, but the *practice* agreeable to his own. The *morality* of the queſtion is entirely on the ſide of the latter, though *policy*, perhaps, is on the ſide of the former. And yet it is difficult to conceive why, with ſtates, as with individuals, honeſty ſhould not, in all caſes, be deemed the beſt policy. Certain it is, that neither an individual nor a ſtate can, upon any moral principle, juſtify the commiſſion of a crime, in order to obtain ſatisfaction for a wrong done, ſtill leſs for a wrong apprehended.

The law of *England* pays no regard to the revenue laws of other countries;

Be this as it may, the law of *England*, it is ſaid, pays no regard to the revenue laws of other countries. And it muſt be confeſſed that even the legiſlature has, in one inſtance, plainly countenanced a contraband trade with foreign nations. The exception in the ſtat. 19 *G.* II. c. 37, ſ. 3, enabling perſons who carry on a trade with the *Spaniſh* and *Portugueſe* colonies to inſure in the ſame manner as before that act, was evidently made to favour the ſmuggling of bullion from thoſe places by perſons, as *Emerigon* obſerves, who could obtain no bills of lading or other evidence of their cargoes. (*a*)

and a policy will not be void, though the trade be a fraud againſt the revenue of a foreign ſtate, and contrary to a *Britiſh* treaty.

And this doctrine has been carried ſo far, that an inſurance upon a voyage, in which it was intended to defraud the revenue of a foreign ſtate, was holden not to be illegal, though fictitious papers were fabricated for the purpoſe of facilitating the fraud. (*b*) Nay, it has been holden by a great and eminent judge, whoſe deciſions are juſtly eſteemed to be the higheſt individual authority upon the ſubject of inſurance, that even when the trade inſured is to be carried on by *Britiſh* ſubjects, not only contrary to the laws of a foreign ſtate, but contrary alſo to

(*a*) See *Emerigon*'s obſervations on this clauſe of the *Engliſh* ſtatute, vol. I. p. 212.—(*b*) R. *Planche* v. *Fletcher*, *Doug.* 238. *inf.* c. 7. ſ. 3.

to the expreſs proviſions of a treaty, to which *Great Britain* was a party, yet, if the inſurer ſubſcribe the policy, with full knowledge of the nature of the trade, the contract will bind him. (*a*) This will appear in the following caſe.

Though the intention of the inſured be to carry on a trade with the ſubjects of a foreign ſtate, forbid by the laws of that ſtate; yet it will be lawful; and if known to the inſurer, the policy will bind him.

Lever v. *Fletcher*, at N. P. after Hil. 1783, *Park* 237.

A ſhip was inſured "At and from *London* to *Penſacola* and *Manſhae* in the river *Miſſiſippi*, with liberty to "touch at *Portſmouth* and *Jamaica*."—The ſhip was employed in the uſual trade in the *Miſſiſippi*, and traded at *Little Manſhae*, in the iſland of *New Orleans* in the dominions of *Spain*. *Manſhae*, the place mentioned in the policy, was part of the continent of *North America*, on that ſide of the river, which, by the treaty of *Paris* in 1763, was ſurrendered to *Great Britain*, and is about 37 leagues higher up than *New Orleans*. The loſs was occaſioned by a ſeizure of the ſhip at *Little Manſhae* by the *Spaniſh* governor, as a repriſal for tranſgreſſions alleged to have been committed by a *Britiſh* ſhip in the *Lakes*.—In an action on the policy, it was contended on the part of the defendant, that the policy being on an illicit trade, the contract was void. Lord *Mansfield*, who tried the cauſe, ſaid—"The firſt queſtion is, whether this policy covers the trading on the *Miſſiſippi*, before the ſhip's arrival at *Manſhae*.—The trading at *Little Manſhae* is a delay of the voyage, and an increaſe of the riſk. If the policy does not cover this part of the trading, then it is a deviation, and there is an end of the contract. It is very clear what the trade is. Every trading with the ſubjects of *Spain* is illicit by the treaty of *Paris*. The navigation is free to both countries, and the municipal laws of both countries remain. Though ſuch trading be contrary to the laws of *Spain*, yet no country pays attention to the revenue laws of another. Therefore, *if the defendant had, with full knowledge that it was a ſmuggling trade with* Spain, *made the inſurance, then it might be a fair contract between* the

(*a*) But though the policy may not be void for this cauſe, yet it has been holden that where a ſhip is ſeized for navigating contrary to the laws of another country, or for not paying cuſtoms, the inſurer ſhall not be anſwerable. Per *Hutchin's* Comm. *Anon.* 2 *Vern.* 176.

the parties. (*a*)—But the main queſtion for conſideration ſeems to be, whether this trading to *Little Manſhac* was inſured by the policy."—The jury found for the defendant, it may be preſumed, on the ground of deviation.

Sect. 2.

Prohibited Commerce with the Britiſh Colonies.

An inſurance on any commerce contrary to the laws of the dependencies of the crown of this kingdom is void.

BUT though the revenue laws of foreign countries are not regarded in *England*, yet an inſurance on goods which are meant to be imported into, or exported from, any of the dependencies of the crown of this kingdom, contrary to the laws in force in thoſe places, would, I conceive, be void: For it would be inconſiſtent with the protection which the ſovereign owes to the ſubordinate ſtate, to encourage any commerce injurious to its intereſts, or to countenance any infraction of thoſe laws, to which the king, as the head of the ſtate, has given his ſanction.

An inſurance on a voyage to the *Eaſt Indies* in contravention of the 9 and 10 *W.* and *M.* c. 44. is void, though the penalties of that ſtatute have been repealed.

Hence it follows that no legal inſurance can be made on any commerce carried on with any of the *Britiſh* colonies, in contravention of the laws made for the regulation of the commerce with thoſe colonies.

The vaſt profits ariſing from the trade to the *Eaſt Indies*, have always afforded a ſtrong temptation to private adventurers to engage in a contraband commerce with thoſe parts, notwithſtanding the charter and the acts of Parliament by which the monopoly of that trade has been, from time to time, ſecured to the *Eaſt India* Company. The act by which this was firſt effectually done, was the ſtat. 9 and 10 *W.* III. c. 44. And though this act has been frequently altered and partly repealed by ſubſequent ſtatutes, yet it has never been wholly put an end to; on the contrary, any infringement of it is ſtill illegal: And though ſuch parts of it as inflicted penalties, have been repealed by the ſtat. 33 *G.* III. c. 52; and though this laſt act has provided that no acts, or

(*a*) The queſtion here was not whether the contract was fair, *as between the parties*; but whether a court of law in *England* ought to have lent its aid to give effect to an inſurance made to protect a trade carried on, not only againſt the revenue laws of another country, but alſo againſt good faith.

or parts of acts, thereby repealed, ſhall be pleaded or ſet up in bar of any action, &c. yet the following caſe proves that it is competent to underwriters who have ſubſcribed a policy on a ſhip trading to the *Eaſt Indies*, in contravention of this act, to avail themſelves of it, in defence to an action on ſuch policy.

A ſhip being employed to carry convicts, ſtores, &c. to *New South Wales*, the owners obtain a licenſe from the *India* Company to ſail thither, and from thence to *Bombay*, there to purchaſe a cargo of cotton, and return to *London*; but ſtipulate that no other trade ſhall be carried on. The owners, however, ſend articles not authorized by the licenſe, with directions to proceed to *Goa*, and ſell them there, or at *Bombay*.—An inſurance on this ſhip is void, being effected on a trade undertaken with a view to break in upon the Company's monopoly.

Camden and others v. *Anderſon*, 6 T. R. 723. 1 *Boſ.* and *Pul.* 272.

The ſhip *Albemarle* was inſured, "At and from *London* to *New South Wales*; and at and from thence to "all ports and places in the *Eaſt Indies*, *Perſia*, *China*, "or elſewhere; and at and from thence until her ſafe "arrival back at *London*; with liberty to touch, ſtay, "and trade at any port or place whatſoever, as well on "this, as on the other ſide of the *Cape of Good Hope*." An action being brought on this policy, for a loſs by capture on the homeward voyage, a ſpecial verdict was found, which ſtated in ſubſtance as follows.—The plaintiffs being employed to convey convicts, ſtores and proviſions, to *New South Wales*, obtained, from the directors of the *India* Company, a licenſe for the ſaid ſhip for a voyage to *New South Wales*, &c.; and from thence to *Bombay*, there to purchaſe cotton, to be legally imported, and ſold at the Company's ſales in *London*. And the plaintiffs covenanted *that the owner, maſter, or mariners ſhould not carry on, or be concerned in, any kind of trade in the* Eaſt Indies, *or elſewhere within the limits of the Company's charter*, &c.; and that if they ſhould carry on any ſuch traffic, they ſhould be conſidered as illicit traders, the goods forfeited, and the perſons be liable to the ſame penalties as unlicenſed traders. The plaintiffs ordered the maſter after the delivery of the convicts, &c. at *Port Jackſon*, to proceed to *Goa*, and there diſpoſe of, or ſend by other veſſels to *Bombay* for ſale, copper and other articles, not authorized by the licenſe of the Company. The ſhip ſailed with the above unlicenſed articles on board; and the plaintiffs wrote to their agent at *Bombay*, informing him of their inſtructions to the maſter. The ſhip, purſuant to the orders of the plaintiffs, ſailed from *Port Jackſon* to *Goa*, where the maſter ſold the licenſed cargo, and then ſailed to *Bombay*, from whence, on the 23d of *December*, 1792, ſhe ſailed for *London*, and was captured in the courſe of the voyage. The ſpecial verdict ſtated further, that

that all the above facts happened before, and the action was commenced after the making of the ſtat. 33 *G.* III. c. 52, and that the plaintiffs were *Britiſh* ſubjects reſident in *England.* —The ſtat. 33 *G.* III. c. 52, continues to the Company, for a further term, the poſſeſſion of the *Britiſh* territories in *India*, together with their excluſive trade, under certain limitations. The 146th ſection repeals ſo much of the ſtat. 9 and 10 *W.* 3. c. 44, and of many other acts, (*a*) as inflicted any penalty or forfeiture for illicit trading to the *Eaſt Indies.* The 147th ſection provides, *that this repeal ſhall not extend to any offence committed againſt any of the ſtatutes thereby wholly or in part repealed, before the paſſing of the act.* The 150th ſection, "for obviating any doubts, how far, notwithſtanding ſuch repeal, contracts made, contrary to the reſtrictions contained in the ſaid acts were binding,"—enacts, 'That it ſhall not be lawful for any 'defendant in any action then depending, or thereafter to 'be brought, to plead or ſet up any act ſo repealed, in 'the whole or in part, in bar of ſuch action; but that the 'plaintiff ſhall have the ſame remedy and judgment as if 'the ſaid acts, or parts of acts, ſo repealed, had never been 'made.'—Upon this caſe it was alleged on the part of the defendant, that the 146th ſection of the ſtat. 33 *G.* III. c. 52, repealing ſo much of the former acts as inflicted penalties for illicit trading to *India*, did not extend to any of the proviſions for granting and ſecuring the excluſive trade to the Company; and that, by ſeveral acts and parts of acts remaining unrepealed, ſuch excluſive right was reſerved to them, and all others prohibited from invading it; and the proviſo in the 147th ſection, was relied on to ſhew that ſuch repeal ſhould not extend to any offence committed againſt any of the acts thereby wholly or in part repealed, before the paſſing of the act. It was therefore inſiſted, that the policy being effected to protect a trade, which was meant to be carried on contrary to the ſpirit and intention of the exiſting laws, was illegal and void; and that the objection might be taken advantage of in this action, although the right of ſuing for the former penalty was taken

(*a*) *Vid.* the acts thus repealed enumerated in 6 T. R. 727.

taken away from any common informer.—On the part of the plaintiffs it was replied, that, as all theſe tranſactions happened before the paſſing of the ſtat. 33 *G.* III. c. 52, the illegality of them could not be taken advantage of in this action, for the 146th ſection repealed all forfeitures and penalties contained in the acts there enumerated againſt ſuch illicit trading; and the 147th ſection merely ſaved the right of ſuch objection as to offences already committed, *to the Company themſelves.* But that the 150th ſection prevented any private ſubject from ſetting up any of the repealed acts or clauſes in bar of any action on any contract made before, as a pretext that ſuch contract was made contrary to the prohibition contained therein.—The court, on full conſideration, determined that the ſtat. 9 and 10 *W.* III. c. 44, was ſtill in force, and that as the policy was effected in contravention of that act, as breaking in upon the monopoly of the Company, it was void, and that the defendant was therefore entitled to judgment.—Lord *Kenyon*, in delivering the opinion of the court, ſaid,—"The ground on which my opinion proceeds in this cauſe is, that the ſtat. 9 and 10 *W.* III. has, from the time when it was paſſed down to the preſent moment, been an exiſting law, operating on the rights of the parties. And though ſubſequent acts of parliament have continued the prohibitions enacted by that ſtatute, and though ſome of thoſe acts have been totally repealed, and others repealed in part, the legiſlature appears to have anxiouſly expreſſed their intention in the ſtat. 33 *G.* III. c. 52, that only that part of the ſtat. 9 and 10 *W.* III. c. 44, which is particularly pointed out, ſhould be repealed. If it had been intended to repeal the whole of that act, and that the prohibitions contained in it ſhould be entirely put an end to, it might have been effected by fewer words than are uſed to repeal that part of the act. And on conſidering the whole of this laſt act, it appears to me that the conſtruction inſiſted on by the defendant is the fair one; namely, that the legiſlature meant to repeal the prohibition to lend money to foreign companies, *&c.* but, by no means had it in contemplation either to abridge, or take away, any

of

of the conſequences of the monopoly given to the *India* Company. The words in the different acts ſhew that the ſtat. 9 and 10 *W.* 3, was always conſidered as being in force."—This judgment was afterwards affirmed upon a writ of error in the *Exchequer Chamber.* (*a*)

If a foreign ſhip trading to the *Britiſh* ſettlements in *India* under a treaty, violate any of the regulations of ſuch treaty, this will avoid any policy on her.

So, if a foreign ſhip trade to the *Britiſh* ſettlements in *India*, purſuant to a treaty with this country, ſhe muſt conform ſtrictly to the regulations preſcribed by ſuch treaty; otherwiſe ſhe will be ſubject, not only to the penalties preſcribed by law for any violation of the company's monopoly, but alſo render void every policy of inſurance made in this country which attaches at any time during the illicit commerce. And an illegal cargo on board for one hour after a policy attaches, will avoid that policy and diſcharge the underwriters from all ſubſequent reſponſibility. But a legal cargo may be inſured, though purchaſed with the proceeds of an illegal one; and though the ſhip had, by her previous illegal commerce, been ſubjected to ſeizure and confiſcation. Theſe points will be found determined, upon full conſideration, in the following caſe.

But a policy on a legal cargo is not vitiated by the ſhip's having *previouſly* acted in contravention of the treaty.

An *American* ſhip at *Bombay* takes in goods for *China* contrary to the *American* treaty. With the proceeds of theſe goods ſhe purchaſes a cargo at *Canton*, for *Hamburgh*.—A policy on the *ſhip at and from Canton* to *Hamburgh* is void, becauſe the illegal cargo was on board part of the time the ſhip remained at *Canton*; and this inſurance will not protect the ſhip on her voyage

An inſurance was made on *goods* on board the *Confederacy*, an *American* ſhip, "At and from *Canton* in *China*, "to *Hamburgh* or *Copenhagen*, with liberty to touch, ſtay, "and trade, at all ports and places whatſoever, particu- "larly at a port in the *Channel*." This policy was effected for the benefit of *Leffingwell* and another. There was alſo a policy on *the ſhip* for the ſame voyage. In an action on theſe policies, it appeared that the ſhip was *American* built, the property of *American* ſubjects, commanded by an *American* captain, and furniſhed with the requiſite *French* paſſport. She ſailed with a cargo from *London*, for *Bombay*, where ſhe arrived in *June* 1796, and there diſpoſed of her cargo; and the captain having, by a licenſe obtained from the governor and council, taken on board a cargo of cotton for *Canton*, ſhe ſailed for that place, where ſhe arrived in *October* 1796. There her cargo was diſpoſed of, and the goods mentioned in the firſt

(*a*) 1 *Pul. & Daſ.* 272.

to *Hamburgh* with another cargo.—But a policy on the *goods* from *Canton* to *Hamburgh* is good, though purchaſed with the proceeds of the illegal cargo. The inſurance on the voyage from *Canton* was legal, though the ſhip had been liable to ſeizure in the voyage from *Bombay* to *Canton*.

Bird v. *Appleton*, 8 T.R. 562.

firſt policy were purchaſed, partly with the proceeds of the cargo from *Bombay*, and ſhipped for *Hamburgh*. The ſhip ſailed for *Hamburgh* in *January* 1797, and was captured by the *French*, carried into *Nantz*, and there condemned on the ground of her having violated ſome of the *French* ordinances.—Theſe facts were ſtated in a ſpecial verdict, in which alſo was ſet forth an article of the treaty between this country and the United States of *America*, referred to in the ſtat. 37 *G.* III. c. 97, by which it is ſtipulated that the citizens of the United States ſhall be permitted to trade with the *Britiſh* territories in the *Eaſt Indies*; but it is expreſsly agreed, "*that the veſſels of the United States ſhall not carry any of the articles exported by them from the ſaid* Britiſh *territories to any port or place, except to ſome port or place in* America, *where the ſame ſhall be unladen*; and that the permiſſion granted by this article is not to extend to allow the veſſels of the *United States* to carry on any part of the coaſting trade of the ſaid *Britiſh* territories." It was alſo ſtated, that the voyage from *London* to *Canton*, and that from *Canton* to *Europe*, were two diſtinct voyages. In the argument upon this ſpecial verdict, the policy on the *ſhip* was abandoned by the plaintiff's counſel, on this ground, that as this policy, which was "*at* and from *Canton*," attached from the time the ſhip arrived there, including the period of time while the cotton taken in at *Bombay*, in contravention of the above article of the treaty, was ſtill on board; and as the immediate voyage inſured could not be ſevered, the whole muſt be deemed an illegal adventure.—On the policy on the *goods*, ſeveral objections were made on the part of the defendant: —1ſt, That the goods inſured were purchaſed with the proceeds of an illegal cargo, namely, that procured at *Bombay*, (it being admitted that the governor's licenſe to purchaſe it was illegal,) and that ſuch an adventure was contaminated by ſuch antecedent illegal traffic.—2dly, That the voyage from *Bombay* to *Canton* was only a part of a larger voyage, out and home, from *London* to *Canton*, and from *Canton* to *Europe*; and that as the ſhip, in the courſe of the voyage, traded at *Bombay* contrary to the treaty between this country and the United States, by not returning

turning directly from *Bombay* to *America*, the whole voyage was illegal.—3dly, That the ſhip was ſeizable, for a violation of the navigation act, in a prior part of the voyage from *Bombay* to *Canton*, and conſequently that the goods inſured were not put on board a proper ſhip, ſuch as the inſured impliedly undertook to provide; and that the right of ſeizure continued at leaſt during the time that the ſhip was on the high ſeas, and until her return home. —4thly, That the ſentence of condemnation by the tribunal at *Nantz*, negatived the ſhip's being an *American*.—But the court determined, that the plaintiff was entitled to recover on the policy on the goods.—Lord *Kenyon* ſaid,—"It is now very properly admitted, that the policy on the *ſhip* muſt be abandoned, becauſe during part of the time that the parties intended that the policy ſhould attach, namely, while the ſhip was at *Canton*, there was ſomething illegal in the tranſaction. As to the policy on the *goods*, the arguments urged for the defendant have not convinced me that this contract is illegal, becauſe the goods inſured were purchaſed with the proceeds of a former illegal cargo. If this objection were well founded, it would go to an alarming extent: In deciding on a claim made on a policy of inſurance, it would be neceſſary to examine and ſcrutinize the paſt conduct of the inſured, in order to ſee whether or not, by their former tranſactions in life, they had illegally acquired the funds with which the particular goods inſured were purchaſed. But we cannot enter into conſiderations of that kind; we muſt confine ourſelves to the immediate tranſaction before us. And the voyage homeward *from Canton* being found to be a *ſeparate and diſtinct voyage* from that *to Canton*, the homeward voyage, therefore, cannot be affected by the former outward voyage. After the greateſt attention which I have been able to beſtow on the ſubject, I adhere to the opinion that we gave in the caſe of *Pollard* v. *Bell*,(*a*) in which it was eſtabliſhed as a propoſition, that the courts of admiralty are to proceed on the known *jus gentium*, or on the treaties between particular ſtates; that ſuch treaties do not alter the *jus gentium* with reſpect to the reſt of the world; but,

(*a*) *Inf.* c. 8. ſ. 4.

but, as between thoſe particular ſtates, they are conſidered as engrafted on the *jus gentium*; and that one ſtate has no authority, by any ordinance of its own, to vary the general law of nations, as to other ſtates. But the ground of the ſentence of the *French* court of Admiralty, in this caſe, is the not conforming to a *French* ordinance in a matter which is neither required by the law of nations, or by the treaty between *France* and *America*; and it is found by the verdict that all the requiſites of that treaty were complied with." Mr. Juſtice *Lawrence* ſaid,—"With regard to the firſt objection made on the part of the defendant, in ſuch a caſe as the preſent, we cannot inquire into the means by which the merchant gains the money that is afterwards laid out in the purchaſe of goods: If the money were obtained by robbery on the highway and inveſted in the purchaſe of a cargo, I do not know why that cargo may not be legally inſured. In order to render the inſurance illegal, the illegality ſhould exiſt during the courſe of the voyage inſured: Nor do I think that the next objection, that the plaintiffs cannot recover, becauſe the ſhip was liable to ſeizure, is well founded. Here the illegality commenced by the captain taking on board a cargo at *Bombay*, in order to carry it to *Canton* for ſale. But the doctrine relied upon by the defendant is perfectly new, that the inſured cannot recover on the policy againſt the underwriters, becauſe the ſhip, in a prior voyage, had been guilty of ſome tranſgreſſion, for which ſhe was liable to be ſeized. That is not a riſk within the policy. If the ſhip had been ſeized for this cauſe during the voyage inſured, the underwriters would not have been liable; they are only liable for riſks in the courſe of the voyage inſured. Then the only remaining queſtion is, whether or not it were decided by the foreign ſentence, that the ſhip was not an *American*. The attempt on the part of the defendant here, is not ſo much to diſpute the authority of the caſe of *Pollard* v. *Bell*, as its application to the caſe before us. However, I am of opinion, that on the whole, we muſt conſider that the foundation of this ſentence of condemnation, was the violation of *French* ordinances only, and conſequently that the caſe of *Pollard* v. *Bell*, is a direct authority for the preſent."

Sect. 3.

Contraband of War.

Vid. ſup. ch. 2. ſ. 1.

IN time of war, it is the duty of thoſe who are not engaged in it, and who profeſs to be neutral, to obſerve an exact impartiality between the contending parties, and to afford no aſſiſtance to either, to the prejudice of the other. *Pacem utrique parti quod medios deceat amicos, optent bello ſe non interponant.* (*a*) To what extent neutrals may trade with a belligerent power, is a queſtion upon which there have always been great diſputes; ſome contending for the rigour of war, and others for a freedom of commerce, which, by the law of nations, as they ſay, one ſtate may carry on with another. It muſt be owned, that in the deciſion of this queſtion, much frequently depends on the power of the party, whether belligerent or neutral, who contends for the one principle or the other. Breaches of neutrality are often ſuffered to paſs unnoticed, becauſe the party who ſuffers by them, finds it neceſſary to diſſemble his reſentment, leſt he ſhould draw new enemies on himſelf; and neutrals often ſubmit to great outrages rather than involve themſelves in war. There are, however, certain principles, which, though occaſionally violated, are univerſally reſpected as public law. That law has pretty accurately defined what ſhall be deemed contraband of war.

The obligations of neutrality.

Some articles of commerce, are of uſe only in war; theſe are the *belli inſtrumenta*, viz. arms, ammunition, and other warlike ſtores; ſome are of no uſe in war, as thoſe that ſerve only for pleaſure, and the uſes of common life; and ſome are uſeful both in peace and war, as money, proviſions, horſes, ſhips, naval ſtores, &c.—The firſt of theſe, namely, warlike ſtores, when ſent to either party, are always deemed contraband by the other; and by the law

What articles are contraband.

(*a*) *Liv.* lib. 35, c. 48. Vid. *Vattel* Droit des gens, liv. 3. ch. 7, n. 103, 104.

law of nations, are ſubject to capture and confiſcation, in whatever veſſel they are found; this ſpecies of commerce with an enemy, being inconſiſtent with neutrality. (*a*) —*Locennius* extends the prohibition even to proviſions. (*b*) But, the law of nations, as at preſent underſtood, ſeems to confine that reſtriction to places beſieged or blockaded. (*c*)

Not only arms, powder, ball, and other ammunition, but alſo horſes and furniture, pitch, tar, ſails, hemp and cordage, maſts, yards, and all other neceſſaries for the building or equipment of ſhips, are generally conſidered as contraband, by the law of nations. (*d*) What articles ſhall or ſhall not be deemed contraband, as between particular ſtates, are often regulated and aſcertained by particular treaties between thoſe ſtates.

Commerce with places beſieged.

Beſide theſe reſtrictions, there is another by which all commerce is abſolutely prohibited with a town or place beſieged, inveſted, or even blockaded; for the beſiegers have, by the law of nations, a right to prevent all communication with the place inveſted, and to treat as an enemy, whoever attempts to enter, or carry any thing into it, without permiſſion. (*e*) And egreſs is as much a breach of a blockade as ingreſs, if it be done fraudulently.

But the power which undertakes a blockade, ought immediately to notify this to all neutral ſtates. The effect of ſuch

(*a*) In hoſtium eſt partibus qui ad bellum neceſſaria hoſti adminiſtrat. *Grot.* lib. 3. c. 1. ſ. 5.—(*b*) De jure maritimo, lib. 1. c. 4. n. 9.—(*c*) *Valin*, tit. *Des priſes*, art. 11. p. 264.—The penſionary *De Witt*, in his letter of the 4th of January 1654, agrees that it would be contrary to the law of nations to reſtrain neutral nations from carrying corn and proviſions to the enemy's country; but he ſays that they may be reſtrained from carrying there any of the neceſſaries for equipping ſhips of war. But Queen *Elizabeth*, in 1599, would not permit the *Danes* or *Poles* to carry proviſions to *Spain*, declaring that "by the rights of War, it was permitted to reduce an enemy by famine, to ſeek for peace."—Vid. *Grot.* lib. 3. c. 1. ſ. 5.—*Vattel* Droit des Gens, liv. 3. c. 7. n. 112.—(*d*) *Vattel* liv. 3. c. 7. n. 112.—(*e*) *Vattel* liv. 3. c. 7. n. 117. *Grot.* l. 3. c. 1. ſ. 5. *Bynk.* quæſt. jur. pub. l. 1. c. 11.

ſuch a notification is, to include all the individuals of thoſe ſtates; becauſe it is preſumed that thoſe ſtates communicate the information to their ſubjects, whoſe intereſts they are bound to protect: Therefore no neutral ſubject, after ſuch notification, can be allowed to aver ignorance of ſuch blockade. There is this difference between a blockade thus regularly notified, and a blockade *de facto*, that, in the former, the act of ſailing to the blockaded place amounts to a breach of the blockade, and ſubjects the neutral ſhip to capture and confiſcation; whereas, in the caſe of a blockade *de facto*, the ignorance of the party may be received as an excuſe for ſailing to the place blockaded. (*a*)

Not only a ſingle port, but a number of ports, and even a great extent of coaſt may be blockaded.—In the month of *March* 1799, the *Britiſh* government notified to all neutral powers, that the ports of *Holland* were all inveſted and blockaded by the *Britiſh* forces, and that every veſſel, of whatever flag, every cargo, and every bottom, attempting to enter them, would become forfeited by the law of nations, as attempting to carry ſuccour to the beſieged.—It muſt be admitted, that in no former war had the blockading ſyſtem been puſhed to this extent: But this has been, not for want of *right*, but for want of *power*. If a ſingle port may be blockaded by a ſingle ſquadron, which has never yet been diſputed, a number of ſquadrons may blockade a certain extent of coaſt: And if a country poſſeſs the power and means, and will incur the expenſe and hazard, of covering the whole extent of an enemy's coaſt, it becomes entitled, upon the ſame principle, to the ſame exemption from neutral interference, as if, with a ſingle diviſion, it inveſted a ſingle fortreſs.

The right of viſiting and ſearching neutrals.

But it would be impoſſible to prevent the tranſport of contraband goods, if neutral veſſels might not be ſearched at ſea; and hence has ariſen the right of ſearch aſſumed by all belligerent powers, though formerly reſiſted by ſuch ſtates

(*a*) See the judgments of Sir *William Scott*, in the caſes of breach of blockade in *Robinſon*'s Reports of Admiralty Caſes, vol. 2. p. 109. 111. 116. 124. 128. 131, &c.

ſtates as were powerful enough to protect their ſubjects in their refuſal. But it ſeems now to be ſettled, that a neutral ſhip which ſhould refuſe to ſubmit to ſuch ſearch, or to produce her papers, would be ſubject to condemnation for that cauſe alone. (*a*) To prevent, however, the inconvenience, vexation, and abuſe ariſing from an unreſtrained licenſe to ſearch all neutral ſhips, the manner of doing it is uſually regulated by the different maritime ſtates, in their treaties of navigation and commerce with each other; and credit is uſually given to the bills of lading, invoices, clearances, and other papers on board, unleſs fraud appear, or there be a reaſonable ground to ſuſpect it. We ſhall have occaſion to conſider this ſubject more at large hereafter. (*b*)

The inſurance of warlike ſtores ſent to the King's enemies is criminal and void.

The ſending of any of the articles denominated *belli inſtrumenta*, or any other ſuccour, by a *Britiſh* ſubject in time of war, to the King's enemies, amounts to the offence of high treaſon. (*c*) It is needleſs to add, that the inſurance of ſuch criminal traffic by a *Britiſh* ſubject, would be void. And though the ſending of ſuch goods to the King's enemies, by the ſubjects of a neutral power, would, in them, be no offence againſt the law of *England*; yet the inſurance of them, in this country, would be, not only void, but highly criminal in every perſon concerned in it.

An inſurance on any trade, carried on in contravention of an embargo laid by the King, is void.

Another reſtriction on commerce ariſes ſometimes from embargoes. The King, by his prerogative, has the power of iſſuing proclamations, which, when they are grounded upon, or are meant to enforce, the exiſting laws of the realm, have a binding force. (*d*) In time of war, when the ſafety of the nation is concerned, the King may, by his proclamation, lay an embargo on all ſhipping, and ſhut up all or any of the ports in his dominions, either generally, or for the particular purpoſe of ſtopping the export of proviſions, or other things; (*e*) and any trade carried on, in contravention of ſuch proclamation, is illegal, and conſequently

(*a*) *Vattel*, liv. 3. ch. 7. n. 114. *Valin*, tit. des priſes, art. 11. p. 270. (*b*) Vid. *inf* c. 8, § 4, n. 3. (*c*) Vid. 4 *Bl.* Com. 82, 83. (*d*) 3 Inſt. 162. (*e*) Vid. 1 *Bl.* Com. 270, 4 *Mod.* 177, 179.

conſequently an inſurance upon ſuch trade, even when carried on by a neutral, is void.

A neutral ſhip obtains a cargo of proviſions in *Ireland*, after an embargo laid, and takes clearances for a neutral country, but ſails for an enemy's port, and is taken.—This being an illegal traffic, the policy is void.

Thus, after an embargo had been laid on all ſhips laden, or to be laden, in *Ireland*, with any ſort of *proviſions*, an inſurance was made on the *Bella Juditta*, a *Venetian* ſhip, the property of a ſubject of *Venice*, "At and from *London* to the *Grenades*, with liberty to touch at *Cork* and *Madeira* to load."—The ſhip ſailed from *London* to *Cork*, and there took in a cargo of *proviſions*, the property of *French ſubjects*, the enemies of *Great Britain*; and having obtained clearances and bills of lading for *Madeira*, ſhe ſailed to that iſland, where ſhe was neither to unload any part of her cargo, nor to take any goods on board; but where ſhe took clearances and bills of lading for *St. Thomas's*, a *Daniſh* iſland, whither ſhe was not deſtined, but only to *Grenada*, then in the poſſeſſion of the *French*, and on her voyage thither was captured by an *Engliſh* man of war, and the cargo condemned by the Vice Admiralty Court of *Barbadoes*, as enemy's property; and the ſhip ordered to be reſtored, but *without freight*, or damages for the capture, becauſe ſhe was engaged in an illicit commerce.—An action was brought on the policy, to recover for this loſs of freight and damages occaſioned by the capture.—But the court held that this voyage was a breach of the embargo; that it was a fraud to go to an enemy's port, under colour of going to a neutral port; and, conſequently, that the inſurance was illegal and void.—Lord *Mansfield* ſaid,—"Is not this a breach of the embargo? The King, in time of war, has an undoubted right to lay an embargo: In time of peace it is another queſtion. Every power lays them on. If the ſhip had only been carrying goods of an enemy on a voyage lawful for her to perform, ſhe might have been entitled to freight. But here the ſentence ſays ſhe ſhall not: And why? Becauſe ſhe has done a wrong thing. It is a fraud; for under colour of a neutral port, ſhe goes to an enemy's port. She breaks an embargo. What the conſequence of that is, has not yet been ſettled: But, to break an embargo is undoubtedly a criminal act; and wherever a man makes an illegal contract,

Delmaſs v. *Matteaux*, B. R. M. 25 G 3. *Park* 234.

tract, this court will not lend him their assistance to enforce it. (*a*)

If all intercourse with a *British* colony be prohibited, an insurance on goods intended to be carried thither is illegal and void.

So, when all intercourse with the *American* colonies was prohibited by act of parliament, the following case will shew that a commerce carried on with such places, during the continuance of this prohibition, contrary to the provisions of the statute, was illegal; and an insurance on the trade void, even though such commerce had been countenanced by government, and encouraged by the King's officers.

Johnston v. *Sutton*, *Doug.* 254.

An insurance was made on goods on board the ship *Venus*, lost or not lost; "At and from *London* to *New York*; warranted to depart with convoy from the *Channel*, for the voyage."—The ship was cleared for *Halifax* and *New York*. She had *provisions* on board, which she had a license to carry to *New York*, under a proviso in the stat. 16 *G.* III. c. 5, § 1, which prohibited all commerce with the province of *New York*, among others, and confiscated all ships and their cargoes which should be found trading, or going to, or coming from, trading with them. But there was a proviso in the act, (§ 2.) excepting 'ships laden 'with provisions for the use of his Majesty's fleets or garrisons, or the inhabitants of any town possessed by his 'Majesty's troops, provided the master should produce a 'license, specifying the voyage, &c. and the quantity and 'species of provisions; but that goods not licensed found 'on board such ships should be forfeited.'—But one half of the cargo, including the goods insured, was not licensed, and was not calculated for the *Halifax* market, but for *New York*. There had been a proclamation by Sir *William Howe*, the commander in chief, to allow the entry of unlicensed

(*a*) There seems to be some inaccuracy in the report of this case. It states a *general* embargo on all ships laden with provisions in *Ireland*; and yet it states that the *Bella Juditta* took in a loading of provisions at *Cork*, from whence she took clearances and bills of lading for *Madeira*, as if that might have been legally done. It is probable that the embargo was confined to provisions meant to be exported to any of the possessions of the enemy.

licenſed goods at *New York*; and though there were bonds uſually given at the cuſtom-houſe here, by which the captain engaged to carry the goods to *Halifax*, thoſe bonds were afterwards cancelled, on producing a certificate from an officer appointed for that purpoſe at *New York*, declaring that they were landed there. The commander in chief had no authority under the act of parliament to iſſue ſuch proclamation, or to permit the exportation of unlicenſed goods.—The ſhip was taken in her paſſage to *New York* by an *American* privateer.—In an action on the policy, there was a verdict for the plaintiff. But, upon a motion for a new trial, the court determined that as this trade was expreſsly prohibited, the inſurance was void, and the plaintiff could not recover.—Lord *Mansfield* ſaid;—"The whole of the plaintiff's caſe goes on an eſtabliſhed practice, directly againſt an act of parliament. If the inſurer did not know that the goods were unlicenſed, the objection is fair as between the parties. If he did, he would not deſerve to be favoured. But, however that may be, it was illegal to ſend goods to *New York*, and, *in pari delicto, potior eſt conditio defendentis.*"

It is impoſſible to bring this within the caſes that have been cited; (*a*) becauſe here there was a direct contravention of the law of the land.

In the caſe of *Giſt* v. *Maſon*, which we have already noticed, (*b*) the inſurance was upon a cargo of proviſions ſent by the inſured from *Ireland* to ſome of the *Weſt-India* Iſlands, which had been captured by the *French* in the *American* war, where the inſured had property, and which were conſtantly ſupplied with proviſions, by means of neutral veſſels, though they were in the hands of the enemy.—In an action by an underwriter againſt the inſured to recover the premium, the illegality of the commerce was objected.—Lord *Mansfield* being of opinion that

An inſurance cannot be made on proviſions, ſent in a neutral ſhip to a *Britiſh* colony while in the hands of the enemy.

Giſt v. *Maſon*, 1 T. R. 84.

(*a*) Theſe were *Planché* v. *Fletcher*, *Doug.* 253. *inf.* and *Burton* v. *Thompſon*, 2 *Bur.* 664. This laſt caſe was cited to ſhew that a court will not ſet aſide a verdict, which was agreeable to juſtice, merely becauſe it was againſt the ſtrict law.—(*b*) *Sup.* 34.

that the policy was not illegal on the face of it, directed a verdict for the plaintiff; and the court afterwards refuſed to grant a new trial to let the defendant in, to ſhew by evidence that the inſurance was upon proviſions ſupplied to the enemy.

Sect. 4.

Commerce with the Enemy.

No *Britiſh* ſubject can trade with the enemy without a licenſe.

BY the common law of *England*, no *Britiſh* ſubject can legally trade with an enemy, without the King's licenſe. The reaſon is, that war puts every individual of the reſpective belligerent governments into a ſtate of mutual hoſtility; (*a*) and there is no ſuch thing as a war for arms, and a peace for commerce. In that ſtate, all treaties, civil contracts, and rights of property, are put an end to. Trading, therefore, which ſuppoſes the exiſtence of civil relations, the rights of property, and the obligation of contracts, is neceſſarily contradictory to a ſtate of war. Beſides, it is criminal in a ſubject to aid and comfort the enemy; and trading not only affords that aid in the moſt effectual manner, by enriching the enemy's country, and increaſing their reſources, but alſo facilitates the means of carrying on a traitorous correſpondence, which may more than counterbalance any advantage likely to accrue from ſuch trading. (*b*) This being ſo, it follows that every contract of inſurance againſt the riſks attendant on ſuch trading, muſt be illegal.

Till

(*a*) Quand le conducteur de l'état, le ſouverain, declare la guerre à une autre ſouverain, on entend que la nation entiere déclare la guerre à une autre nation. Car le ſouverain repreſente la nation, et agit au nom de la ſociété entiere, et les nations n'ont à faire les unes aux autres qu'en corps dans leur qualité de nations. Ces deux nations ſont donc ennemis; et tous les ſujets de l'un ſont ennemis de tous les ſujets de l'autre. L'uſage eſt ici conforme aux principes. *Vattel*, liv. 3. c. 5. n. 70.—(*b*) Vid. the arguments and authorities in ſupport of this doctrine, in the very learned and eloquent judgment of Sir *William Scott*, in the caſe of the *Hoop*, *Rob.* Adm. Rep. 201.

Till lately, however, as we had occaſion to obſerve in the laſt chapter, the general opinion, ſupported by conſtant practice, was, that in *England*, not merely the goods of *Britiſh* ſubjects purchaſed of the enemy, but even the goods of the enemy themſelves, might be legally inſured, and the legiſlature has frequently found it expedient, in times of war, to interpoſe its authority to reſtrain ſuch inſurances.(*a*) The caſes of *Brandon* v. *Neſbitt*, and *Briſtow* v. *Towers*, (*b*) have gone the length, however, of diſabling an alien enemy, or any other on his behalf, from maintaining an action on a policy on the property of ſuch alien enemy, at leaſt during the continuance of hoſtilities. But the queſtion ſtill remained, whether a *Britiſh* ſubject might inſure goods purchaſed by him in the enemy's country, when the two following caſes, ariſing out of the ſame tranſaction, drew that queſtion into a full diſcuſſion, which has terminated in ſetting it finally at reſt, upon the ſure foundation of law.

Goods bought of the enemy cannot be inſured.

The firſt of theſe caſes was an inſurance on goods on board the *Elizabeth*, from *Rotterdam* to *Hull*.—In an action on this policy, brought in the court of *Common Pleas*, to recover for a total loſs by capture, there was a verdict for the plaintiff, ſubject to the opinion of the court, on a caſe which ſtated in ſubſtance,—"That the *Elizabeth* was a neutral ſhip, bound on the voyage inſured; that ſhe was captured by the *French* and the goods loſt; that the plaintiffs had on board a quantity of madder purchaſed for them, and on their account, at *Rotterdam*, by their agent, a *Britiſh* ſubject reſident there; that at the time the goods were purchaſed and ſhipped, and alſo at the time the inſurance was effected, open hoſtilities exiſted between *Great Britain* and *Holland*; that during all that time, it was the conſtant practice to enter goods at the Cuſtom Houſe here, direct from *Holland*, and this was never impeded, though the officer knew from whence they came, as he always inquired whether they were alien's goods, on account of the alien duty."—Upon this caſe it was inſiſted on the part of the defendant, that this inſurance was

Goods the produce of *Holland* are purchaſed there during hoſtilities between *Great Britain* & *Holland* for a *Britiſh* ſubject, and ſhipped for *England*—It was determined that ſuch goods might be legally inſured in *England*.

Bell v. *Gilſon*, 1 *Pul.* & *Beſ.* 345.

(*a*) *Vid.* ſup. 30.—(*b*) *Sup.* 36, 37.

was illegal, becauſe a *Britiſh* ſubject could not lawfully purchaſe goods from, or carry on any commerce with, the enemies of the King. But the court (*a*) held that the inſurance was legal.—Mr. Juſtice *Buller* ſaid,—"The queſtion is, whether this policy on goods, purchaſed ſince the commencement of hoſtilities, and ſhipped at *Rotterdam*, be legal or not. It is clear that this is not an inſurance on enemy's property, and therefore we have nothing to do with that conſideration here. The caſe ſtates that the goods were purchaſed for the plaintiff at *Rotterdam* by his agent. But whoſe goods they were before, is not mentioned. They might have been the property of neutrals or of an *Engliſhman*. Suppoſe an *Engliſhman*, at the commencement of hoſtilities, to have goods in an enemy's country; may he not bring them away? But I will go one ſtep farther: I will ſuppoſe that the party had ſtolen theſe goods, and that, being in poſſeſſion of them at the time of the policy made, he wants to bring them home. The underwriter will have no right to go into the ſtate of the property previous to the time when he inſured. Suppoſe certain requiſites to have been neceſſary, by the law of *Holland*, to make a good ſale there, ſhall the underwriter ſay that the goods were not ſold according to the law of *Holland?* Or, if they were ſeized by a pirate, and ſold by him to the plaintiff; ſhall the underwriter ſet up that as a defence? Whether the goods were improperly ſold to him or not, provided he has paid the value, he is intereſted to the amount of them; and ſhall he not inſure them? The underwriter cannot be permitted to go beyond the time when the goods were ſhipped. If *Britiſh* ſubjects have goods in the enemy's country, it is moſt clearly for the intereſt of this country that they ſhould be able to bring them home."—Mr. Juſtice *Heath* concurred in this opinion, and ſaid,—"It is clearly competent to a *Britiſh* ſubject to reſide in *Holland* in time of peace, or to have a factor there. If ſo, may he not, on the commencement of hoſtilities, bring home his property? It has been objected, in this caſe, that the goods were purchaſed ſince the commencement of

(*a*) Lord C. J. *Eyre* was abſent.

of hoſtilities; but we muſt remember that a man cannot always remit his effects to another country in ſpecie. He muſt convert them into ſuch goods as are merchandizable in the place in which he wiſhes to remit them. It is not ſaid that theſe parties carried on trade, but only that they bought theſe particular goods. Steering clear, therefore, of the general queſtion, whether a *Britiſh* ſubject may carry on trade in an enemy's country, in time of war, I think the plaintiff has a right to recover."—Mr. Juſtice *Rooke* thought that the facts of the caſe were ſtated in ſo general a way, that they imported a general trading with an enemy's country; and therefore he conceived that he could not decide this caſe, without giving an opinion on the general queſtion, which he thought unneceſſary, as it would not affect the judgment of the court, the other two judges having declared their opinions in favour of the plaintiffs.

The other caſe, which was on the ſame policy, was tried in the court of Common Pleas, and there was a verdict for the plaintiffs. A bill of exceptions was tendered on the part of the underwriter, and allowed, upon which the ſame facts appeared as in the former caſe. The cauſe was removed by writ of error into the *King's Bench*, and after two arguments, firſt by common lawyers, and again by civilians, the court, after time taken for conſideration, were unanimouſly of opinion that a *Britiſh* ſubject's trading with an enemy, without the King's licenſe, was illegal; and that the inſured, therefore, could not recover on the policy.

But it was afterwards determined upon great conſideration, that ſuch trading was illegal, and the inſurance made to protect it void.

Potts v. *Bell.* 8 T. R. 548.

Sect. 5.

The Wages and Effects of the Maſter and Mariners.

IT ſeems to be the policy of all maritime ſtates to uſe every precaution to prevent the deſertion of the ſeamen, to intereſt them in the preſervation of the ſhip, and to incite them to the moſt vigorous exertions in times of danger. With this view the ſtat. 8 *G.* I. c. 27. § 7. was

Seamen are not to be paid more than a moiety of their wages abroad.

of the nature of profit, and till it be acquired, the owner of the ſhip has not an inſurable intereſt in it. But, by a declaration of the *French* government in 1779, freight, *actually earned*, was permitted to be inſured; and it was provided, that in caſe of loſs, it ſhould not be included in the abandonment of the ſhip, unleſs it were expreſsly ſo ſtipulated in the policy. But freight, though actually earned, can in *France* be inſured only by the *freighter*, when he agrees to pay the freight at all events. It is, in that caſe, an expenſe which he muſt loſe, if the ſhip ſhould be loſt without completing her voyage, and therefore a fair ſubject of inſurance. (*a*)

In *England*, the freight as well as the ſhip may be inſured.

But the mere inſurance of a ſhip, let out on freight, would afford the owner but an inadequate protection, where the loſs of freight follows that of the ſhip. In *England*, therefore, the freight, as well as the ſhip, may be legally inſured. And this is conformable to the practice in *Italy*. (*b*)

But the inſured can only recover for a loſs of freight, where the riſk on freight has been commenced.

To entitle the owner, however, to recover for a loſs, on a policy on freight, it muſt appear that, before the loſs, the owner's right to freight had commenced; that is, that the ſhip had actually begun to earn freight, for till then the riſk on freight does not commence. Therefore, if the cargo be ready to be put on board, but the ſhip is loſt while preparing for the voyage, the inſured ſhall not be entitled to recover for the loſs of freight. (*c*) But if part of the cargo be ſhipped, there is then an inception of the riſk on freight, and the inſured, upon a valued policy, ſhall recover for the whole freight. (*d*) So, if the ſhip ſail on her voyage to the port where ſhe is to take in her cargo, this ſhall be a commencement of the riſk on the freight, and if the ſhip be loſt before her arrival at her port of loading, the inſurer on the freight is liable. (*e*) See this ſubject more fully treated, poſt. ch. 6. § 6.

(*a*) Vid. *Le Guidon*, ch. 15. art. 1. *Valin*, ſur art. 15. p. 58. *Pothier*, h. t. n. 36. *Emerig.* tom. 1. p. 225.—(*b*) *Roccus*, not. 96. (*c*) Per *Lee*, C. J. in *Tonge* v. *Watts*, inf. c. 6. § 6.—(*d*) Per Lord *Kenyon*, in *Montgomery* v. *Eggington*, inf. c. 6. § 6.—(*e*) *R. Thompon* v. *Taylor*, inf. c. 6. § 6.

Sect. 7.

Slaves.

Slaves formerly insured as goods.

THERE is ſomething extremely offenſive to humanity in the idea of any part of the human ſpecies becoming property, and a ſubject of commerce, capable of being bought and ſold like beaſts of burthen. And yet it is to be lamented that this traffic has exiſted in all ages, even amongſt the moſt poliſhed nations of the world, and where moral refinements were the moſt highly cultivated.

The insured was protected even from loſſes by mortality.

For upwards of two centuries, a commerce in negro ſlaves has been carried on by the ſeveral maritime ſtates of *Europe*, for the purpoſe of ſupplying their colonies in *America* and the *Weſt Indies* with labourers. The unfortunate objects of this cruel traffic were formerly too much conſidered as mere merchandize. The merchant inſured them as ſuch, and, with us, till lately, he was protected by the policy againſt any loſs ſuſtained in the voyage, even by mortality, if it could, by any conſtruction, be attributed to any of the perils mentioned in the policy. At length, however, the *Britiſh* legiſlature, rouſed by the calls of humanity, has interpoſed: and though it has not been thought wiſe at once to aboliſh this trade altogether, it has been ſubjected to many wholeſome reſtraints, not only in the manner of carrying it on, but alſo in the inſurance of it. The object of theſe regulations is, to intereſt all perſons concerned in the tranſporting of ſlaves from *Africa* to the *Weſt Indies*, in their health and preſervation; and nothing can more conduce to that end, than reſtraining the inſurance of them againſt loſs by mortality, or, indeed, againſt any loſs not ariſing from inevitable accidents and misfortunes. Theſe regulations will be particularly mentioned hereafter, when we come to treat of the riſks againſt which inſurances may be made. (*a*)

How this trade and the inſurance of it, are now regulated.

(*a*) Vid. inf. ch. 6. § 1. Vid. alſo ch. 12. § 1.

Sect. 8.

Profit.

How inſurable abroad.

IN *Italy*, a merchant is permitted to inſure the profit he expects to derive from the goods he exports. (*a*)—The *French* ordinance of the marine, (*b*) on the contrary, adopting the rule of the *Roman* law, "*Detrimenti, non lucri, ſit præſtatio*," (*c*) prohibits the inſurance of profit. Nothing, indeed, in *France*, ſeems to be deemed a proper ſubject of inſurance, but the ſhip, and ſuch effects on board as are the abſolute property of the inſured, at the commencement of the riſk. Profit, therefore, being precarious, and depending upon the uncertain event of future traffic, does not come within that deſcription. (*d*)

How in *England.*

In *England*, though it is not unuſual to infure profit, *eo nomine*, the queſtion whether this be a proper ſubject of inſurance, has never yet come under ſolemn diſcuſſion.

Grant v. *Parkinſon, Park* 267.

In the caſe of *Grant* v. *Parkinſon*, (*e*) which we ſhall have occaſion hereafter to mention more particularly, an inſurance was made *on the ſhip, and goods on board*; and this, in the policy, was declared to be "*on the profit expected to ariſe on the cargo*, in the event of the ſhip's ſafe arrival." It was proved at the trial, that the plaintiff had a reaſonable expectation of profit, upon a cargo of molaſſes, which was to be uſed by him in the making of ſpruce beer, to ſupply the army in *Canada*, for which he had a contract with government; and this was held to be an inſurable intereſt.

But it is to be remembered that this was not an inſurance upon profit, *eo nomine*; but upon the *ſhip and cargo*, with a declaration in the policy, which ſhewed, that the ſole intereſt of the inſured was in the profit expected to ariſe to him from the uſe he meant to make of the cargo.

(*a*) *Roccus*, h. t. not. 31.—(*b*) *Tit.* Aſſurance, art. 15.—(*c*) *Dig.* lib. 14. tit. 2. de lege Rhodia, de jactu, § 4.—(*d*) Vid. *Emerig.* tom. 1. p. 232.—(*e*) *Inf.* c. 4. § 2.—

cargo. One principal ground of the deciſion was, that this was a valued policy, in which, provided the object of the contract be not a wager, any qualified property in the goods inſured, or any reaſonable expectation of profit or advantage to ariſe therefrom, will amount to an inſurable intereſt. (*a*) Had the policy been an open one, it would have been extremely difficult to form any juſt eſtimate of the loſs. The inſured might have calculated it upon the probable gain which he might have made of the molaſſes, when employed in the making of ſpruce beer, and charged to government according to his contract. The underwriter might think, and perhaps with more reaſon, that the difference between the invoice price and charges, and the market price at the port of delivery at the time of the loſs, was the only fair meaſure of profit for which the inſurer ought to be liable. Many caſes might be put of much greater difficulty in the calculation of profit; and this affords, perhaps, one of the ſtrongeſt grounds of objection to the inſurance of profit, at leaſt in an open policy; and if it may be inſured in a valued one, this will open a new door to the evaſion of the ſtat. 19 *G.* II. c. 37, to which valued policies have already too great a tendency.

In eſtimating a total loſs upon goods inſured by an open policy, it has been the uniform practice, to add to the prime coſt, all duties and expenſes, together with the premium of inſurance; and the amount of theſe has always been held to be a full indemnity. Nor is there any inſtance of profit being avowedly added, even where the loſs has happened at the port of delivery. For inſtance, if 1000l. be inſured on goods, which are loſt in the port of delivery, before they are landed; and it appear that the invoice price, together with all charges, and the premium of inſurance, amount to 800l.: But the goods, at the time of the loſs, would, had they been ſafely landed, have been worth 1000l. the ſum inſured; yet the loſs would be eſtimated at no more than 800l. So that whether the goods arrive at a riſing or a falling market,

(*a*) Vid *inf.* c. 4, § 1.

market, the loſs to be paid by the underwriter is the ſame. The beſt reaſon that can be aſſigned for this is, the difficulty of aſcertaining the true amount of the loſs, where profit which is ſo uncertain, is to be taken into the account. Perhaps the ſame reaſoning may be thought to apply, with equal force, to the caſe of an inſurance on profit expreſſed in the policy.

CHAP. IV.

Of the Intereſt of the inſured in the Subject Matter of the Inſurance.

HAVING in the two foregoing chapters inquired what perſons may be parties to the contract of inſurance, and what may be the ſubject matter of it; we will now proceed to examine the property or *intereſt*, as it is uſually termed, which the inſured muſt have in the thing inſured, to give validity to the contract. This may be done under the following heads.

1. Inſurable Intereſt;
2. Wager-policies;
3. Re-inſurance;
4. Double Inſurance.

Sect. 1.

What ſhall amount to an Inſurable Intereſt.

INSURANCE is ſaid to be, '*a contract of indemnity 'from loſs or damage, ariſing upon an uncertain event.*' The object of inſurance, ſtrictly ſpeaking, is not to make a *poſitive gain*, but to avert a *poſſible loſs*. A man cannot properly be ſaid to be *indemnified* againſt a loſs which can never happen to him. There cannot be an indemnity without a loſs, nor a loſs without an intereſt. A policy, therefore, without intereſt, is not an inſurance, but only a mere wager. Of ſuch wagers we will treat at large in the

the next ſection. At preſent we will conſider what intereſt in the thing inſured, the law of *England* deems ſufficient to give validity to the contract.

Qualified property.

It would be extremely difficult to give any accurate definition of inſurable intereſt. The intereſts of commerce, and the various and complicated rights which different perſons may have in the ſame thing, require that not only thoſe who have an *abſolute* property in ſhips and goods, but thoſe, alſo, who have a *qualified* property therein, may be at liberty to inſure them; and this principle has been carried ſo far, that if a merchant abroad, in order to ſecure the payment of a debt due to his correſpondent in *England*, mortgage to him his intereſt in certain goods and freight; the correſpondent, after the mortgage becomes abſolute, may inſure the *legal* intereſt on his own account, or the *equitable* intereſt on account of the mortgagor. (*a*)

Different perſons having each a qualified property in goods, may inſure them to the full value.

Godin v. *Lond. Aſſur.* 1 *Bur.* 489. 1 *Bl.* 103, *inſ.* § 4.

Thus, where *A.* a merchant at *Peterſburgh*, writes to *B.* his correſpondent in *London*, to whom he is indebted, informing him that he has ſhipped a quantity of goods for *London*, conſigned to him, and will ſend him the bill of lading, and deſiring him to inſure them. This *B.* immediately does, and *A.* having ſhipped the goods, inſtead of ſending the bill of lading to *B.*, indorſes it, for a valuable conſideration, to *C.* at *Peterſburgh*, who tranſmits it to *D.* his correſpondent in *London*, with directions to inſure, which *he* alſo does; but appriſes the underwriters of the former inſurances made on the ſame goods by *B.*—In this caſe it was determined, upon great conſideration, that each had an inſurable intereſt.

The following caſe will further illuſtrate the ſame principle.

The indorſement of a bill of lading to a creditor, is payment *pro tanto*, and conveys, *prima facie*, the whole property in the goods from the time of delivery

An inſurance was made on goods, "At and from *Jamaica* to *London*;" and it was ſtated at the head of the policy, to be, "*on account of Robert Kerr*, Eſq."—— The plaintiffs were merchants in *London*, and the general conſignees

(*a*) Per *Aſhurſt*, J. in *Smith* v. *Laſcelles*, 2 T. R. 188.

But if it be only to bind the net proceeds, the indorser has still an insurable interest.

Hibbert & others v *Carter*, 1 T. R. 745.

consignees of *Kerr*, a planter in *Jamaica*; and were in the constant habit of getting his goods insured. On the 23d of *December* 1782, they received advice from him by letter, dated the 18th of *October*, of his having shipped 10 hogsheads of sugar on board the *Devonshire*, with general directions to insure whatever goods were shipped by him. —The insurance in question was immediately effected; but between the time when the order was sent, and the effecting of the policy, *Kerr* indorsed the bill of lading to one *Dellprat*, to whom he was indebted, and informed the plaintiffs of this by letter. The bills of lading, as they originally stood, expressed the sugars to be shipped on the account and risk of "*the shipper*," with directions to deliver to his order, or that of his assigns. The indorsement was in these terms:—"Deliver the above "sugars to Mr. *J. Hodgson*, for account of *S. Dellprat*, "*Robert Kerr*."—The ship was lost.—An action being brought on the policy, the plaintiffs, at the trial, rested their case on the above facts.—The defendant objected that *Kerr*, having assigned the bill of lading before the insurance was actually effected, the averment in the declaration that these sugars had been insured *on his account*, was not true; for he had not then any insurable interest in him, the entire property having passed out of him by the assignment of the bill of lading, which operated in this instance as a payment.—Mr. Justice *Buller*, who tried the cause, being of this opinion, would have nonsuited the plaintiffs: But the defendant having neglected to pay the premium into court, they took a verdict for that sum.—They moved, however, for a new trial, insisting that the verdict ought to have been for the *whole* sum insured.—But the court determined that the plaintiffs were not entitled to recover for any *loss* in this case, being all clearly of opinion, that where a bill of lading is taken by a creditor as a security for his debt, on his own account, the whole property passes by the delivery, and is to be considered as a satisfaction of the debt, *pro tanto*: But, that the parties are always at liberty to vary from the general rule, by entering into any particular agreement between themselves; which, however, must

muſt be ſhewn, in order to take advantage of it.—Afterwards the motion was renewed, by leave of the court, on an affidavit ſtating the particular tranſaction between the parties; viz. That *Kerr* had no intention to paſs the whole *property*, by the indorſement of the bill of lading; but only to bind the *conſignment*; for which purpoſe he had ordered the plaintiffs to pay the net proceeds to *Dellprat*; and that ſince that time, *Kerr*'s executors had accounted to *Dellprat* for the amount of the ſugars that had been loſt, a demand having been made on them for that purpoſe. Upon theſe new facts, a new trial was granted without oppoſition. (*a*)

A reaſonable expectation of *profit*, or a well founded expectation of a future intereſt in the thing inſured, is an inſurable intereſt.

In the caſe of *Grant* v. *Parkinſon*, which we have already had occaſion to mention, and which we ſhall have occaſion to mention more particularly hereafter, (*b*) it was determined that a reaſonable expectation of profit, though it be not a veſted property, is an inſurable intereſt. Upon the authority of that caſe, it has ſince been determined, that the poſſeſſion of the things inſured, and a reaſonable expectation of a future intereſt therein, though depending on the pleaſure of the crown, is an inſurable intereſt. (*c*) Of this nature is the intereſt which the captor acquires in a prize regularly taken in war. From the moment that the victor hoiſts his flag on board a conquered ſhip, he has acquired a qualified property in her which he may inſure. (*d*) For though the King is, in contemplation of law, the captor, and the property of every prize immediately veſts in him; yet the practice

(*a*) Vid. *Caldwell* v. *Ball*, 1 *T. R.* 205.—(*b*) Vid. ſup. 78. *inf.* § 2.—(*c*) But a mere hope or expectation of future gain, however well-founded, is not an inſurable intereſt, unleſs accompanied by poſſeſſion of the ſubject matter of the inſurance.—Vid. *Tonge* v. *Watts*, *inf.* c. 6 § 5.—(*d*) Item quæ ex hoſtibus capiuntur, jure gentium ſtatim capientium fiunt. Dig. l. 41, tit. 1, § 5, n. 7. de acquir. rer. dom. Un priſe que fait en tems de guerre un vaiſſeau corſaire, autoriſé pour aller en courſe, eſt un profit acquis auſſitot qu'elle eſt fait: C'eſt pour quoi le propriétaire du vaiſſeau corſaire peut le faire aſſurer pour tous les dangers qu'elle court, juſqu' à ce qu'elle ſoit amené dans un port de *France*, *Pothier*, h. t. n. 38.

practice of beſtowing all prizes taken from the enemy, upon the officers and men, who are the perſons immediately concerned in the capture, is ſo conſtant and uniform, that the law will conſider the expectation, founded upon this practice, as equivalent to a veſted intereſt. This doctrine will be found exemplified in the following caſe.

The captors, upon a joint capture by ſea and land forces, have an inſurable intereſt in the prize, before condemnation.

Le Cras v. *Hughes*, B. R. E. 22 G. 3, MS.

An inſurance was made on the ſhip *Saint Domingo* and her cargo, "At and from *Omoa* to *London*;"—In an action on the policy it appeared, that Captain *John Luttrell*, with a ſquadron of men of war, and Captain *Dalrymple*, with a party of land forces on board, captured two *Spaniſh* regiſter ſhips, lying under the protection of *Fort Omoa*, together with the fort itſelf, which were a joint capture to the ſea and land forces: That the *Saint Domingo*, one of the regiſter ſhips, on her voyage to *London*, laden with the property captured, was, together with a great part of her cargo, loſt by the perils of the ſea: That the intereſt, intended to be covered by the policy, was that of the *officers and crews of the ſquadron*. The goods were valued at the ſum inſured. There were other policies on the ſame ſhip and goods amounting in all to 99,500l.—The principal queſtion was, whether, by the *Spaniſh* prize act, (*a*) the captors had an *inſurable intereſt* in theſe prizes.—On the part of the underwriters, it was objected that, as this was a joint capture by the ſea and land forces, the ſoldiers had not only no ſhare, but prevented the navy from having any; for, the act not having provided for ſuch a capture, the whole reſted in the crown. —But the court determined that the plaintiff had an inſurable intereſt.—Lord *Mansfield*, in delivering the opinion of the court, ſaid—"There are two queſtions in this cauſe; *firſt*, Whether the ſea officers had an inſurable intereſt, and this will depend on the prize act and proclamation; and, *ſecondly*, Whether poſſeſſion, and the expectation of future benefit, founded on the contingency

(*a*) Stat. 19 G. III. c. 67.

gency of a future grant from the crown, but warranted by almoſt univerſal practice, would amount to an inſurable intereſt. As to the firſt, the act gives to the officers, ſeamen, marines and ſoldiers on board every ſhip of war, the ſole property in all ſhips and goods which they ſhall take during the war, after condemnation. So that the act does not ſay that the ſeamen only ſhall take, nor does it leave a joint capture by the army and navy altogether undefined. It is like the caſe of a capture by a combined fleet. I remember ſuch a caſe, but the *Engliſh* ſailors could not claim the whole, nor could the act mean that they ſhould have nothing. The ſame obſervation might be made on a joint capture by the King's ſhips and privateers. For ſuch caſes there is no proviſion in the act, and yet, no doubt, the navy is entitled. Where ſoldiers aſſiſt, their right may be doubtful, but that does not leſſen the right of the navy.—As to the ſecond ground, the crown always makes the grant, and there is no inſtance to the contrary. —Probable profit may be inſured, and the caſe of *Grant* v. *Parkinſon*, (*a*) where an intereſt, *not veſted*, was holden to be inſurable, is an authority in point. On either ground, therefore, the Plaintiff has an inſurable intereſt."(*b*)

The caſe of *Grant* v. *Parkinſon* went much farther than this. In that caſe there was neither a veſted intereſt nor poſſeſſion of that in which the intereſt was claimed, but only a bare expectation of profit: Here, there was a veſted intereſt, a poſſeſſion, and a reſponſibility to the owner, if it ſhould turn out that the capture was illegal.

Truſtees having the diſpoſal of ſhips and goods according to the directions they may receive from third perſons, may inſure.

The following caſe, which has been recently determined, ſhews that perſons, in the character of *truſtees*, for the diſpoſal of ſhips and goods according to ſuch inſtructions as they might receive from third perſons, may inſure ſuch ſhips and goods for the benefit of the perſons who may eventually be entitled to the produce of them.

Commiſſioners being authoriſed by ſtatute to take into their care all *Dutch* ſhips, &c. detained in *Britiſh* ports, and to diſpoſe thereof

The ſtat. 35 *G.* III. c. 80, § 21, after reciting that ſeveral ſhips and veſſels belonging to the ſubjects of the

(*a*) *Inf.* § 2.—(*b*) See *Boehm* v. *Bell*, inf. ch. 15, § 1. where the ſame point was admitted as clear law.

according to directions from the privy council, may inſure, in their own names, ſuch ſhips, after ſeizure at ſea, and while they are on their paſſage to *England*.—A count ſtating the nature of their truſt, and averring an intereſt in them *as commiſſioners*; or even without any averment of intereſt in any perſon, but with an averment that the ſhips inſured did not belong to his Majeſty or any of his ſubjects, is good.

Crawford and others v. *Hunter*, 8 T. R. 13.

the *United Provinces*, and others having on board goods and effects belonging to ſuch ſubjects, had been, or might be, thereafter *detained in, or brought into the ports of this kingdom*, and ſuch ſhips and cargoes might periſh and be greatly injured if ſome proviſion were not made reſpecting the ſame, gives to his Majeſty the power of granting 'a commiſſion to three or more perſons, authoriſing them 'to take ſuch ſhips and cargoes into their poſſeſſion and 'under their care, and to manage, ſell, or diſpoſe of the 'ſame to the beſt advantage, according to ſuch inſtruc-'tions as they ſhould from time to time receive from his 'Majeſty, with the advice of his privy council.'—Commiſſioners being appointed under this Act, and certain *Dutch* ſhips with their cargoes being ſeized at ſea by one of his Majeſty's ſhips, and carried into *St. Helena*, in order to be brought from thence to *England*, the plaintiffs, by the name of "The honourable commiſſioners for the ſale of *Dutch* property," as well in their own names as in the names of all other perſons to whom the ſame might appertain, made an inſurance on theſe ſhips and goods, loſt or not loſt, at and from *St. Helena* to *London*.—A loſs having happened in the courſe of the voyage, the plaintiffs brought their action on the policy, and in their declaration, after ſtating the above facts, averred that they, *as ſuch commiſſioners*, at the time of the ſailing of the ſaid ſhips from *St. Helena*, and from thence until the time of the ſeveral loſſes, *were intereſted* in the ſaid ſhips and goods to the amount of the ſums inſured, and that the ſaid inſurance was made for their uſe, benefit, and account, *as ſuch commiſſioners*. It then ſtated the ſailing of the ſhips from *St. Helena*, and their ſubſequent loſs by the perils of the ſea, and that the plaintiffs as ſuch commiſſioners ſuſtained an average loſs of 40l. *per cent.*—The ſecond and third counts were ſimilar to this, but the one averred the intereſt to be in *his Majeſty*, the other in the *Dutch Eaſt India Company*. The fourth count was alſo ſimilar, except that it did not aver intereſt in any perſon; but merely ſtated that the policy was made by the plaintiffs as ſuch commiſſioners, 'as well in their own names, as 'for

'for and in the name or names of all and every other 'perſon or perſons to whom the ſame did or might apper- 'tain in part or in all.' It alſo contained this averment, that '*the ſaid ſhips or any of them were not belonging to his* '*Majeſty or any of his ſubjects*, before or at the time of 'making the policy, or at the ſeveral times of the loſſes 'happening; and that the plaintiffs were the perſons who 'gave the orders and directions to the agent immediately 'employed to effect the policy.'—Upon a ſpecial demurrer to the firſt and fourth counts, it was objected, as to the firſt, (averring the intereſt to be in the plaintiffs as commiſſioners,) that they had, at the beginning of the adventure, and at the time when the inſurance was effected, only an intereſt *in expectation* in the ſhips and goods, and that no caſe had ever gone ſo far as to determine that to be an inſurable intereſt: That their authority to manage, ſell, and diſpoſe of the property, (from which alone an intereſt could ariſe to them,) was not to commence till the arrival of the property in a *Britiſh* port, which event never took place, and conſequently their intereſt never attached. And as to the fourth count, it was objected that it was *repugnant in ſubſtance*, inaſmuch as it averred that '*none of the ſhips inſured belonged to his Majeſty or any* '*of his ſubjects*,' (which averment was made to take the caſe out of the ſtat. 19 *G.* II. c. 37, prohibiting wagering inſurances on ſhips or goods belonging to his Majeſty or any of his ſubjects;) whereas theſe ſhips, being ſeized under his Majeſty's orders, belonged to him: But at all events, it ought to have been ſpecifically averred in this count that there was an intereſt in ſome perſon, eſpecially ſince the above act: And though the general allegation that the inſurance was effected by the plaintiffs, for and in the names of all perſons who might be intereſted, was large enough to comprehend all perſons who were in fact intereſted, yet it could not be maintained that an inſurance intended for the benefit of one individual, could be thus transferred to another.—The court, after two arguments, were clearly of opinion that the plaintiffs were [illegible] to judgment on the firſt count, and that the ſecond

ond count was alſo good.—Lord *Kenyon* ſaid:—"The ſhips having been ſeized at ſea by his Majeſty's ſhips of war, were at *St. Helena*, and were to be brought to this country to be put under the care, management, and diſpoſal of the plaintiffs, as commiſſioners under the act. Being ſo ſeized, they could not come here under any other management, or to any other perſons than the plaintiffs, *as truſtees*. Then can a *truſtee* inſure? There is no doubt but he may. It was ſaid, however, in the courſe of the argument, that there cannot be a truſtee for the Crown: But that argument was ſoon abandoned, as untenable; and certainly it cannot be ſupported. Then can a *conſignee* inſure? Surely he may. Can an *agent for prizes* inſure? Certainly; and theſe plaintiffs are like agents for prizes. With one part of the caſe of *Le Cras* v. *Hughes* (*a*) I fully concur, and on that no doubt can be entertained, namely, that an agent for prizes, though he has not the poſſeſſion, has ſuch an intereſt in the ſhips coming home, that he may inſure; and in ſo deciding, Lord *Mansfield* only proceeded on principles previouſly ſettled and eſtabliſhed. Therefore, as well on the authority of that caſe, as on certain poſitions which muſt be admitted on all hands, I am of opinion that the plaintiffs are entitled to our judgment on the firſt count. The ſecond queſtion, whether or not the plaintiffs may declare in the manner in which the *fourth* count is framed, depends, I think, on the conſtruction of the ſtat. 19 *Geo.* II. c. 37. Notwithſtanding what has been ſaid in the argument on behalf of the defendant, I think that, at common law, a perſon might have inſured without having any intereſt. And this is in ſome meaſure proved by the caſe of *Goddart* v. *Garret*. (*b*) Since that, an application was made to the Court of Chancery to have the policy delivered up: For that Court ſometimes relieves, as was ſaid by Sir *J. Jeykell* in *Cowper* v. *Cowper*, (*c*) againſt the rigour of the law, when certain circumſtances are diſcloſed, to induce that court to interfere. But the preamble and enacting part of the ſtat. 19 *G.* II. c. 37, remove

A truſtee, a conſignee, or an agent for prizes may inſure.

At common law, an inſurance might have been made without intereſt.

(*a*) Sup. 84.—(*b*)—2 *Vern.* 269, inf. § 2.—(*c*) 2 *P. W.* 753.

remove all doubt on this point. It recites the miſchief and inconveniences that had ariſen from the making of inſurances, intereſt or no intereſt, and then it *enacts*, (not declaring,) that no ſuch inſurance ſhall be made, except in certain caſes, which, for very wiſe and politic reaſons, were excepted. Therefore I am ſatisfied that this count is good, unleſs it be on an inſurance prohibited by the ſtatute. But that ſtatute only applies to "ſhips belonging to his Majeſty or any of his ſubjects," and does not extend to foreign ſhips. The defendant's counſel then wiſhed to conſider theſe ſhips as belonging to the Government of this country: But that cannot be ſo conſidered, for the property in captured ſhips is not altered before condemnation in the Court of Admiralty.—Mr. Juſtice *Aſhurſt* ſaid,—"The principal queſtion in this caſe is, whether the fourth count can be ſupported for want of an averment of intereſt in the plaintiffs in the ſubject-matter inſured; as to which, I am of opinion, that the declaration is good, without ſuch an averment. For this is not a caſe that falls within the purview of the ſtatute againſt gaming policies. But without entering into that, upon the firſt count, it is ſufficiently clear, that the plaintiffs were intereſted. It is not neceſſary that there ſhould be any technical form of words made uſe of by way of averment of intereſt; it is ſufficient if the fact appear to be ſo. Suppoſe the ſubject of the inſurance had been an enemy's ſhip, taken as prize, in time of war, by a King's ſhip, and the captain of ſuch ſhip had inſured her, I ſhould conceive ſuch inſurance would be good. The information given to the underwriters by the plaintiffs, on the face of the preſent declaration, is matter of equal notoriety; for it ſhews the act of Parliament by which a power and authority were veſted in the Crown for the ſeveral purpoſes therein mentioned, and that the plaintiffs were appointed commiſſaries by the King, to take care of ſuch property, of a certain deſcription, as might come into their hands, and that this was property of that deſcription. This ſeems to be all that the underwriters could have occaſion

The captain who makes a capture may inſure his prize.

" and ſhews that the plaintiffs were in the nature of

of agents. The plaintiffs did not affect to make this inſurance in their own right, but as truſtees for thoſe perſons who ſhould eventually be entitled to it."—Mr. Juſtice *Groſe* ſaid,—"The firſt queſtion in this caſe is, whether or not the plaintiffs had an inſurable intereſt in the ſhips and goods inſured. Now they were either truſtees, conſignees, or agents, for thoſe who might eventually be entitled to the produce. If they were truſtees or conſignees, it ſeems admitted that they might have inſured. And if they be conſidered as agents, then they had an inſurable intereſt, according to the deciſion in the *Omoa* caſe. As to the other queſtion, whoever reads the ſtatute 19 *Geo.* II. muſt ſee what the law was before the paſſing of that act. Before that time, a wagering policy was not illegal. The words of that ſtatute clearly ſhew that before that time perſons might have inſured without intereſt; therefore it is not neceſſary to aver intereſt in any caſe not prohibited by that act. And this caſe does not come within the prohibition of that act, becauſe it was an inſurance on foreign ſhips."

It is not neceſſary to aver intereſt in any caſe not prohibited by the 19 *G.* II. c. 37.

The following caſe will ſhew that a mere *ceſtui que truſt* of goods, without any legal title, may inſure.

A. being indebted to *B.* without any order from *B.*, conſigns goods to *C.* to be held for *B.* and indorſes the bill of lading to *C*: *B.* has a good inſurable intereſt in the goods ſo conſigned to *C.*

An inſurance was made on behalf of the plaintiffs, on goods on board the *San Bernardo*, "at and from *Andero* to *London*.—In an action on this policy to recover a loſs by capture, it appeared that *De la Torré*, in *Spain*, had conſigned 29 bags of wool to *Dubois* in *London*, and indorſed the bill of lading to him; but that, with the bill of lading, came a letter, directing *Dubois* to hold 15 bags for a houſe at *Halifax*, and the remainder for the plaintiffs at *Exeter*, which were the goods inſured. It alſo appeared that *De la Torré* was indebted to the plaintiffs to the amount of 500l., but that they had given no orders for theſe goods: The only queſtion was, whether the plaintiffs had an inſurable intereſt.—They obtained a verdict; and, on a motion for a new trial, it was contended on the part of the defendant, that as the bill of lading was not indorſed to the plaintiffs, and as *De la Torré* would ſtill be liable for his debt to them, if the goods ſhould not reach them, they

Hill and al. v. *Secretan*, 1 *Pul.* & *Boſ.* 315.

they remained the property of *De la Torré*, and the plaintiffs had no right in them.—But the court were clearly of opinion, that, as the goods were conſigned to *Dubois*, to hold for the plaintiffs, he was to be conſidered as truſtee for them; and that the plaintiffs, being creditors of *De la Torré*, raiſed a good conſideration for the conſignment, and the plaintiffs had a good inſurable intereſt.

A general agent to whom a conſignment devolves, in conſequence of the conſignee's refuſal to take the goods may inſure them as agent for the conſignor, or in his own right, if he has accepted bills on account of them.

If the conſignor of a cargo of goods ſend the bills of lading, together with the bills of exchange for the amount of the cargo, to his general agent, with directions to deliver the bills of lading to the conſignee, on his accepting the bills of exchange, and the conſignee refuſe to receive the goods or accept the bills of exchange: Such general agent becomes in effect the conſignor of the goods, and may inſure them as agent for the conſignor, or in his own right, if he has accepted bills on the credit of the goods. (*a*)

But an inſurable intereſt can only be founded on a legal or equitable title; and a mere claim which the law cannot admit to be either legal or equitable, is not an inſurable intereſt.

From the authorities which have been already cited, it appears that, provided the object of the contract be not a wager, almoſt any qualified property in the thing inſured, or any reaſonable expectation of profit or advantage to ariſe therefrom, will conſtitute that ſort of intereſt which the party may legally protect by inſurance.—Still, however, an inſurable intereſt muſt be founded on ſome legal or equitable title; and the following caſe will ſhew, that though a perſon may have a ſort of *claim*, which, as between him and the legal owner, might be thought reaſonable, and ſuch as the legal owner could not conſcientiouſly diſpute; yet if this claim be inconſiſtent with the only title which the law can recognize, it will not be deemed to be even an equitable title, and therefore not an inſurable intereſt.

Four Perſons purchaſe a ſhip, which is only regiſtered in the names of *two* of them; the *four* have not any inſurable intereſt in the freight, having neither a legal nor an

In an action on a policy on freight valued at 5000l. there were two counts in the declaration. The firſt averred the intereſt to be in the three plaintiffs, *Camden*, *Calvert* and *King*, in whoſe names the inſurance was made; the ſecond averred it to be in the plaintiffs and one *Curtis*.

(*a*) R. *Wolff* v. *Horncaſtle*, 1 *Pul.* & *Baſ.* 316. poſt. c. 7. § 3.

equitable title to the ship

Camden & al. v. Anderson, 5 T. R. 709.

tis.—On the trial, it appeared that the ship, of which the freight was insured, had been paid for by the four persons named in the last count, to whom a bill of sale was made.—The defendant produced a register made in 1786, in pursuance of the stat. 26 *G.* III. c. 60, (Lord *Hawkesbury*'s act,) wherein the ship was registered in the names of *Camden* and *Calvert* only, and it was insisted, that, as the plaintiffs' title to freight could only arise from the ownership, the register was decisive evidence that no other person than those two were interested in the property; (*a*) and there was no count in the declaration stating the interest to be in those two.—The plaintiff, however, took a verdict, with liberty to the defendant to move to enter a nonsuit.—Upon this motion, it was contended on the part of the plaintiffs; *first*, that it was competent to *Camden* and *King*, in whose names the ship was registered and the bill of sale taken, to transfer their right by parol agreement to the other two partners jointly with themselves; *secondly*, that it was sufficient for them to shew that they had an equitable interest to entitle them to freight; that upon the stat. 19 *G.* II. c. 37, requiring that the insured should have an interest in the subject matter of the insurance, there was no doubt; for whether it was a legal or an equitable interest, or even a reasonable expectation of an interest, it was still insurable. —But the court clearly held that the *four* partners had not any insurable interest in the freight, and a nonsuit was accordingly entered.—Lord *Kenyon* said,—"I studiously avoid discussing the question whether or not a party may insure a *hope or expectation*, not having any interest in the subject insured: It will be time enough to examine that case when it arises. But on the present question I cannot entertain

Whether a hope or expectation be insurable is not decided.

(*a*) By stat. 26 *G.* III. c. 60. § 17, 'When and so often 'as the property in any ship or vessel shall be transferred to any 'other or others, in whole or in part, the certificate of the re-'gistry of such ship or vessel shall be truly and accurately recited, 'in words at length, in the bill or other instrument of sale 'thereof, otherwise such bill of sale shall be utterly null and void 'to all intents and purposes.'

entertain a doubt; for the right to freight reſults from the right of ownerſhip; and if the plaintiffs have no title to the ſhip, they have no intereſt in the freight. It is like the caſe of an action for uſe and occupation: If one perſon permit another to enjoy his eſtate, it is not competent to the latter to diſpute the title of the former.—But if the former bring an action againſt a third perſon, which depends on his own title, he cannot ſucceed, unleſs he ſhew a title. So, if the plaintiffs had let out the ſhip to other perſons, perhaps thoſe perſons would not have been ſuffered to conteſt the plaintiffs' title: But here, the plaintiffs claim the freight in right of ownerſhip: They had no right to inſure the freight, unleſs they can ſhew a right to the ſhip: It is not pretended that they had any legal title to the ſhip; and according to the deciſion of *Hibbert* v. *Rolleſton*, (*a*) they had no equitable title. It was there held, that the regiſter act was equally binding in a court of equity, as in a court of law, and the court refuſed to compel the vendor to make a legal conveyance to the purchaſer, who claimed under a defective bill of ſale. And, indeed, if an equitable intereſt could prevail in contradiſtinction to a legal intereſt, it would repeal the wiſe proviſions of that act, which has proved highly beneficial to the commercial intereſts of this country."

Freight can only be due to the legal owner of the ſhip, and he only can inſure it.

And no perſon can have either a legal or equitable title to a ſhip, unleſs he be named in the regiſter.

Though *reſpondentia* and bottomry loans are of themſelves a ſpecies of inſurance, yet the lender has an inſurable intereſt in his ſecurities, and therefore may protect himſelf from the *ſea-riſk* by inſuring them. If I lend *J. S.* 1000*L.* on bottomry at 12 *per cent.* for a given voyage, and the ſhip arrive ſafe, he muſt pay me the ſum lent with the ſtipulated intereſt. If ſhe be loſt, *J. S.* is diſcharged from the debt. My capital is therefore put in riſk; and there can be no reaſon why I ſhall not inſure it. And this inſurance is in nature of a re-inſurance.

The lender upon bottomry and *reſpondentia* has an inſurable intereſt for the ſums lent.

In ſeveral parts of *Italy* it is permitted to lend money on bottomry and *reſpondentia*, where the borrower has nothing

(*a*) 3 T. R. 406.

thing on board. It is ſingular, however, that in ſuch caſe, if the lender inſure his capital, and the ſhip be loſt, the inſured is not anſwerable, unleſs the inſurance was made in the *form* of a wager. At *Genoa*, even in that form, ſuch inſurance is prohibited. (*a*)—In *Italy* the lender may inſure, not only his principal, but alſo the maritime intereſt. But upon the intereſt, the inſurance is conſidered as a wager. Even the honeſty of the borrower may be inſured. (*b*)—In *France* the borrower is prohibited from inſuring the ſum borrowed; and the lender, though he may inſure his capital, muſt not inſure the intereſt. (*c*) The lender can inſure only the amount of the ſum lent, and the borrower has an inſurable intereſt in the ſhip or goods to the amount of the ſurplus value above the ſum lent. (*d*) If either were to inſure more, it would be a gaming inſurance, and void by the ſtat. 19 *G.* II. c. 37, for all above the real intereſt.

The owner of the ſhip or goods has only an inſurable intereſt in the ſurplus value above the ſum lent.

Yet where the uſage of a particular trade has ſanctioned a departure from this rule, an inſurance made in conformity to ſuch uſage will be good.—As where an inſurance was made on behalf of the captain of an *Eaſt-Indiaman*, on "*goods, ſpecie, and effects*" on board his ſhip.—In an action on the policy, the plaintiff claimed to recover, under that inſurance, money which he had expended in the courſe of the voyage for the uſe of the ſhip, and for which he charged *reſpondentia* intereſt.—On the trial of the cauſe, it was proved by the teſtimony of many captains in the *Eaſt India* trade, that this kind of intereſt was always inſured under the denomination of goods, ſpecie and effects.—The court determined, that under this uſage the plaintiff might recover.—Lord *Mansfield*, after delivering his opinion upon another point which aroſe in the caſe, ſaid;—"As to the queſtion, whe-

But the uſage of trade may take a caſe out of this rule. Upon an inſurance on goods, ſpecie and effects in the *India* trade, the inſured may recover for money laid out for the uſe of the ſhip, and for which he charged reſpondentia intereſt: it being the uſage of the trade to inſure in this form.

Gregory v. *Chriſtie*, *B. R.* Tr. 24. *G.* III. *Park* 11. inſ.

"ther

(*a*) *Caſaregis*, diſc. 14. n. 21.—(*b*) *Caſaregis*, diſc. 1. n. 123, 124.—(*c*) Ord. of *Louis* 14, h. t. art. 16, 17. *Pothier*, h. t. 32, 44. *Emerig.* tom. 1. p. 236, 237.—(*d*) Vid. 19 *G.* II. c. 37, § 5, and Lord *Mansfield*'s expoſition of it in *Glover* v. *Black*, 3 *Bur.* 1394, 1 *Bl.* 399, 405, 422.

"ther goods, ſpecie, and effects," comprehend this intereſt, I ſhould think not, if we were to conſider only the *words* made uſe of. But here there is an *expreſs uſage* which muſt govern our deciſion. A great many captains in the *Eaſt India* ſervice ſwear that this kind of intereſt is always inſured in this way; and I obſerve that the perſon here inſured is the captain.

It is plain that a policy on bottomry or *reſpondentia* cannot be ſubſcribed by the borrower of the money; becauſe it is only in conſideration of the ſea riſk, from which he is exempt, that he agrees to pay the marine intereſt. If he were to become an inſurer, this would be no longer a loan upon bottomry, but a cloak for uſury.

The borrower cannot underwrite a policy on bottomry.

Sect. 2.

Of Wager Policies.

MANY are the contrivances which men have fallen upon for the gratification of their propenſity to gaming: And the uncertain events of maritime adventure afford an obvious and extenſive field for the calculation of chances, and the deciſion of fortune. Gaming.

The practice of gaming, by nouriſhing a conſtant hope of gain, excites in the mind an intereſt which engroſſes the attention, and withdraws the exertions of men from uſeful purſuits. By pointing out a ſpeedy, though hazardous mode of accumulating wealth, it produces a contempt for the moderate, but certain, profits of ſober induſtry. It perverts the activity of the mind, taints the heart and depraves the affections. By frequent and great reverſes of fortune, it becomes not only the ſource of great private miſery, but ſuggeſts conſtant temptations to fraud and the perpetration of atrocious crimes.

There are a few well regulated governments in which gaming has not been laid under conſiderable reſtrictions. In this country ideas leſs rigid have prevailed. Innocent wagers

Legality of wagers in *England*.

wagers have long had the ſanction of the common law.(*a*) They are only deemed illegal where they are prohibited by ſtatute; (*b*) where they tend to create an improper influence on the mind in the exerciſe of a public duty; (*c*) where they are *contra bonos mores*, or in any other manner tend to the prejudice of the public, or the injury of third perſons. (*d*) And after all it muſt be owned, that the law greatly deſcends from its dignity, when it lends its aid to give effect to any wager, however innocent.

We

(*a*) 11 *Rep.* 876, 1 *Lev.* 33, 5 *Bur.* 2802.—(*b*) *R. Ximenes* 6 T. R. 499.—(*c*) *R. Allen* v. *Hearn*, 1 T. R. 56.—(*d*) *R. Atherfold* v. *Beard*, 2 T. R. 610, *R. Da Coſta* v. *Jones*, *Cowp.* 729. And yet in the caſe of *Jones* v. *Randall*, *Cowp.* 37, the Court determined that an action might be maintained on a wager, 'whether a decree of the court of Chancery 'would be reverſed or not in the Houſe of Lords.'—It is not eaſy to reconcile with any juſt idea of public policy that a wager upon the event of a deciſion in the ſupreme court of juſtice ſhould have met with ſo much countenance. In the caſe of *Atherfold* v. *Beard*, above referred to, Mr. Juſtice *Aſhurſt* ſays that, 'in 'his opinion, the courts had gone far enough in encouraging 'wagers, and that it would, perhaps, have been better for 'the public if the courts had originally determined that no ac- 'tion could be maintained to enforce the payment of a wager.' Mr. Juſtice *Buller*, in the ſame caſe, ſeemed to doubt the legality of any wager between perſons not intereſted in the ſubject matter; and ſaid that the ſtat. 14 *G.* III. c. 48, extended to all wagers, though it ſpeaks only of *policies*; 'for,' ſays he, 'ei- 'ther the courts muſt reſtrain that act to ſuch caſes as *in form* 'are policies, which would entirely repeal it; or, by purſuing 'the ſpirit of it, extend it to all caſes. I think the latter is 'the true conſtruction; for a policy is nothing but a promiſe. 'And it would be ſtrange to determine that the party might do 'the ſame thing in one form, which the ſtatute has expreſsly 'prohibited to be done in another.'—In the caſe of *Good* v. *Elliott*, 3 T. R. 693. Mr. Juſtice *Buller* had an opportunity of maintaining the opinion which he had thus thrown out.—The queſtion was, *firſt*, whether a wager that *A.* had purchaſed a waggon of *B.* was void at common law, as being a *gaming contract*; and *ſecondly*, whether it was void by the above ſtat. 14 *G.* III. The learned judge maintained the affirmative on both points. But the reſt of the judges of the court of King's Bench, namely,

We have already obſerved, (*a*) that an inſurance, being a contract of *indemnity*, its object is, not to make a *poſitive gain*, but to avert a *poſſible loſs*; and that, as a man can never be ſaid to be *indemnified* againſt a loſs which can never happen to him, a policy without intereſt is no inſurance, but only a mere wager. It is *ſpei emptio*, and not *averſio periculi*, which is the true idea of an inſurance. A policy, therefore, made without intereſt, is properly denominated a wager policy, and has nothing in common with inſurance but the name and form.

Difference between a wager and an inſurance.

It is uſually conceived in the terms, '*intereſt or no intereſt*,' or '*without further proof of intereſt than the policy*;' to preclude all inquiry into the intereſt of the inſured. And, as a conſequence of the inſured's having no intereſt in the pretended ſubject of the policy, it follows that the inſurer cannot be liable for any partial loſs. A partial loſs is not an event ſufficiently defined and accurate to be the criterion of a wager; and nothing but that ſort of misfortune which is conſidered as amounting to a total loſs can decide it. The parties mean to play for the whole ſtake; and when the underwriter pays a loſs, he cannot, as in the caſe of an inſurance upon intereſt, claim any benefit from what may have been ſaved. To preclude all claim of that ſort, the words '*free of average, and without benefit of ſalvage*,' are always introduced into wager policies.

Form of a wager policy.

Theſe

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namely, Lord *Kenyon*, Mr. Juſtice *Aſhurſt*, and Mr. Juſtice *Groſe*, were clearly of a contrary opinion upon both points. They held that, however it might be wiſhed that no wagers were permitted, yet that the queſtion, whether an action would lie on *any* wager, had been ſettled by ſo many authorities, both ancient and modern, that no doubt could be entertained upon it. And as to the ſecond point, whether the wager was void by the ſtat. 14 *G.* III. they held that that act related wholly to *policies of inſurance*, and that it would be diſtorting the meaning of the words, to ſuppoſe that ſuch a wager as the above could have been within the meaning of the legiſlature.

(*a*) *Sup.* 80.

Wager policies prohibited in moſt of the commercial ſtates.

Theſe gaming contracts were formerly in uſe in *France*, and they are ſtill tolerated in *Portugal* and ſome parts of *Italy*. In *France*, the miſchief of them was ſoon diſcovered, and they were prohibited in the year 1681, by the ordinance of the marine, (*a*) which ſeems to have been, in this reſpect, ſcrupulouſly enforced. And ſo general, indeed, is the averſion from all inſurances not founded upon a real and veſted intereſt in the thing inſured, that not only wagers, in the form of inſurances, but even inſurances upon expected profit, freight not earned, ſeamen's wages, &c. are prohibited by the ordinances of moſt of the commercial ſtates of *Europe*. (*b*)

Whether legal in *England*.

If the queſtion, whether a wager policy be a legal contract at common law, were now *res integra*, I think it would be extremely difficult to maintain the affirmative. As a *wager*, I need only refer the reader to the preamble to the ſtat. 19 G. II. c. 37, (*c*) to ſhew that it is pregnant with as much miſchief, both public and private, as can proceed from any ſpecies of gaming which the legiſlature has hitherto found it neceſſary to repreſs. And yet, within the ſpace of little more than a century, it has crept into uſe in this country, and has at length obtained the ſanction of the courts of *Weſtminſter*. It will not be unintereſting to trace, as far as we are enabled by authorities, the ſteps by which this miſchievous ſpecies of gaming came to find ſo much favour in the eyes of the law.

(*a*) Defendons de faire aſſurer ou réaſſurer des effets au dela de leur valeur, par une ou pluſieurs polices, à peine de nullité de l'aſſurance, et de confiſcation des marchandiſes. —Si toutefois il ſe trouve une police faite ſans fraude, qui excéde la valeur des effets chargés, elle ſubſiſtera juſqu'à concurrence de leur eſtimation ; et en cas de pèrte, les aſſureurs ſeront tenus chacun à proportion des ſommes par eux aſſurecés comme auſſi de rendre la prime du ſurplus à la reſerve du demi pour cent. Ord. de la Mar, h. t. art. 22, 23. Vid. *Valin* ſur ces articles, p. 71, 72.—(*b*) Vid. Ord. of *Amſterdam*, *Rotterdam*, *Conningſberg*, *Genoa*, *Stockholm*, &c. as collected by *Magens*.—(*c*) Inf. 103.

At what time theſe wager policies firſt came into uſe in this country, is not quite certain; but it was probably ſince the revolution. The clauſe "*intereſt or no intereſt*," does not neceſſarily make the policy a wager. This clauſe was at firſt countenanced in the ſuppoſition that it only amounted to an admiſſion of the intereſt of the inſured, and could have no other effect than to ſave him the trouble and expenſe of proving his intereſt in caſe of litigation. (*a*)

At what time introduced there.

In the caſe of *Martin* v. *Sitwell*, which came before the court of King's Bench in the year 1691, it was admitted that where goods are inſured, but it appears that the inſured had none on board, the policy, by the cuſtom of merchants, is void, and the inſurer bound to return the premium.

Martin v *Sitwell*, 1 *Show.* 156.

The firſt caſe I can find where the validity of an inſurance without intereſt came directly in queſtion in *Weſtminſter Hall*, was in the year 1692.—A bill was filed in the Court of Chancery to have a policy delivered up to be cancelled, upon the ground that the inſured had no intereſt either in the ſhip or cargo.—The inſured had lent 300l. on bottomry on the ſhip; and, without any other intereſt, inſured 450l. upon her. The ſhip ſurvived the time limited in the bottomry bond; but was loſt within the time limited by the policy, and the inſured claimed not only the money due on the bond, but alſo the ſum inſured by the policy.—The court (*b*) decreed the policy to be delivered up to be cancelled, and ſaid,—"Take it, that the law is ſettled, that if a man has no intereſt and inſures, the inſurance is void, although it be expreſſed in the policy, *intereſted or not intereſted*. And the reaſon the law goes upon is, that inſurances are made for the encouragement of trade, and not that perſons unconcerned in trade, nor intereſted in the ſhip, ſhould profit

In 1692, a policy was ordered to be delivered up to be cancelled, becauſe the inſured had no intereſt.

Godart v. *Garrett*, 2 *Vern.* 269.

(*a*) Per Cur. in *De Paiba* v. *Ludlow*, 1 *Com. Rep.* 361. —(*b*) The commiſſioners of the great ſeal were, at that time, Sir *John Trevor*, Mr. Serjeant *Hutchins*, and Mr. Serjeant *Rawlinſon*.

profit by them. The reaſon why the law allows, that a man having ſome intereſt in a ſhip or cargo, may inſure more, or five times as much, is, that a merchant cannot tell how much, or how little, his factor may have in readineſs to lade on board his ſhip."

In 1710, a wager policy was admitted in *B. R.* to be a legal contract.

Aſſievedo v. *Cambridge*, 10 *Mod.* 77.

In the courſe of twenty years from this time, this doctrine ſeems to have given place to a contrary ſentiment; for in 1710 a caſe came before the court of King's Bench, upon a ſpecial verdict, where the queſtion was, whether the inſured upon a policy without intereſt, was entitled to recover as for a total loſs, where the ſhip, having been captured, was re-captured before ſhe was carried *infra præſidia hoſtium.*—The caſe was argued by civilians; but it was only contended on the part of the defendant, that the inſured, in a *wager policy*, ought not to recover in a caſe where he could not have recovered on a policy *upon intereſt*. It was never objected that the policy was void for want of intereſt; ſo that the legality of wager policies ſeems not to have been at that time doubted. On the contrary, Doctor *Floyer*, in arguing for the plaintiff, inſiſted that, as the policy was a wager, the queſtion whether the capture diveſted the property out of the owners, did not ariſe between the plaintiff and defendant; the only queſtion between them being merely, whether the ſhip was in fact taken.

In 1716, it was holden that the value in the policy ſhould be the true value of the effects inſured.

Le Fypre v. *Fauv.* 2 *Vern.* 716.

A few years afterwards, (Mich. 1716,) upon a bill for a diſcovery filed in the court of Chancery by the underwriters againſt the inſured, upon a valued policy; the Lord Chancellor ordered the defendant to diſcover what goods he had put on board: For though he offered to renounce all intereſt to the inſurers, yet it was referred to a maſter to examine the value of the goods ſaved, and to deduct it out of the 600l. at which the goods were valued by the agreement.

Not much can be gathered from the imperfect report of this caſe, except that in the caſe of a valued policy, the inſured was conſidered as bound, if called upon, to ſhew that goods to the amount of the value in the policy were in fact put on board; from which it may be inferred that

that the court of Chancery, at leaſt, ſtill deemed the policy valid only to the extent of the intereſt of the inſured.

And yet, in the ſame term, a caſe, not unlike that of *Goddart* v. *Garrett*, (*a*) came before the ſame court, in which the opinion of the Lord Chancellor ſeems to have proceeded on quite a contrary principle. There it appeared that the defendant had lent the plaintiff 250l. on bottomry, and afterwards inſured the ſhip for the ſame ſum, but for a greater voyage than that which was mentioned in the bottomry bond. The ſhip being loſt, the defendant recovered the money on the policy, and alſo put the bottomry bond in ſuit, the ſhip having, before ſhe was loſt, deviated from the voyage mentioned in the bond.—The plaintiff brought his bill, inſiſting that, as the defendant had no intereſt in the ſhip, but in reſpect of the money lent on bottomry, he ought not to have the fruit both of the bond and the policy, and praying to have the benefit of the inſurance, on paying the premium. —But the Lord Chancellor held that the defendant, having paid the premium, was entitled to the benefit of the policy, as well as of the bond.

In the ſame year it was determined that the lender on bottomry might inſure; and might have the benefit, not only of the bond but of the policy alſo.

Harman v. *Van Hatton*, 2 *Vern.* 717.

The deciſion of this caſe is quite at variance with that of *Goddart* v. *Garrett*, and ſhews that a new doctrine, founded on a new principle, had introduced itſelf into the court of Chancery ſince the year 1692.

In the year 1721, a caſe nearly ſimilar to that of *Aſſievedo* v. *Cambridge*, (*b*) came before the court of Common Pleas.—A ſhip, inſured intereſt or no intereſt, was captured by a pirate, and after nine days, retaken and brought into an *Engliſh* port.—The court determined that the defendant was reſponſible. For though it was objected that the inſurer was only reſponſible where the plaintiff had a property, and that the term of inſuring, intereſt or no intereſt, was introduced ſince the revolution; yet it was ſaid that ſuch inſurance was good, and the import of it was, that, as the defendant could not controvert the intereſt,

In 1721, it was determined that an inſurance intereſt or no intereſt was good.

De Paiba v. *Ludlow*, 1 *Com. Rep.* 361.

(*a*) Sup. 99.—(*b*) Sup. 100.

intereſt, the plaintiff had no occaſion to prove it.—From this laſt declaration it would ſeem that though the judges were not, at that time inclined to diſcountenance inſurances in this form, yet they were not quite willing to admit them to be mere wagers.

In 1746, a wager policy was holden to be good.

In 1746, a caſe came before Lord C. J. *Lee* at *niſi prius*, upon a policy without intereſt, on goods.—The ſhip was taken and carried into an enemy's port, from whence ſhe was cut out by an *Engliſh* ſhip eight days after.—The plaintiff inſiſted that this policy, though on goods, was a wager on the bottom of the ſhip, and that he was therefore entitled to recover as for a total loſs. The defendant inſiſted that, as the ſhip and cargo were to be reſtored on paying ſalvage, this was only an average loſs, and the plaintiff could only recover in the caſe of a total one.—But the Chief Juſtice held that the plaintiff ought to recover; for his was a wager upon a total loſs *in the voyage*, and there had happened one by the capture and detention for eight days.

Dean v *Dicker*, 2 *Str.* 1250. *inf.* c. 12, § 3.

Theſe are all the early caſes I have been able to find on this queſtion. From the firſt of them it appears that, even ſince the revolution, it was determined that an inſurance without intereſt was void. Afterwards it would ſeem that policies, *intereſt or no intereſt*, which were at firſt perhaps, inſurances upon real intereſt, became in time only a cloak for mere gaming contracts, were at length openly avowed, and became frequent ſubjects of litigation in the courts of *Weſtminſter*.

More modern deciſions.

In more modern times, our moſt eminent judges have recognized them as legal contracts.—Lord *Mansfield*, in delivering the opinion of the court in the caſe of *Goſs* v. *Withers*, (*a*) diſtinguiſhes between wager policies and policies upon real intereſt, in order to ſhew that in an action upon the former, the plaintiff could only recover in the caſe of a total loſs; but that, upon the latter, the inſured might recover the loſs really ſuſtained, whether total or partial.—In the caſe of *Crawford* v. *Hunter*, (*b*) Lord

(*a*) *Bur.* 695, inf. c. 13, § 2.—(*b*) 8 *T. R.* 23. ſup. 85.

Lord *Kenyon*, and the reſt of the judges of the court of King's Bench were unanimouſly of opinion, that, at common law before the ſtat. *G.* II. c. 37, a perſon might have inſured without having any intereſt in the thing inſured.

Certain it is that this ſpecies of gaming, having thus obtained the ſanction of the law, became, about the year 1746, ſo prevalent, and the evils reſulting from it ſo injurious to the beſt intereſts of this country, that the legiſlature found it neceſſary to interpoſe, and by the ſtat. 19 *G.* II. c. 37, has impoſed ſome wholeſome reſtraints upon it.

At length prohibited.

The preamble recites that, 'Whereas it hath been 'found by experience that the making of inſurances, in- 'tereſt or no intereſt, or without further proof of in- 'tereſt than the policy, hath been productive of many 'pernicious practices, whereby great numbers of ſhips, 'with their cargoes, have either been fraudulently loſt and 'deſtroyed, or taken by the enemy in time of war; and 'ſuch inſurances have encouraged the exportation of 'wool and the carrying on of many other prohibited and 'clandeſtine trades, which, by means of ſuch inſur- 'ances have been concealed, and the parties concerned 'ſecured from loſs, as well to the diminution of the pub- 'lic revenue, as to the great detriment of fair traders; 'and by introducing a miſchievous kind of gaming, un- 'der pretence of inſuring againſt the riſk on ſhipping 'and fair trade, the inſtitution and laudable deſign of 'making inſurances hath been perverted; and that which 'was intended for the encouragement of trade and nav- 'igation hath, in many inſtances, become hurtful of, 'and deſtructive to the ſame.'—The ſtatute therefore enacts, (§ 1.) 'That no inſurance ſhall be made on any 'ſhip or ſhips belonging to his Majeſty, or any of his 'ſubjects, or any goods or effects laden on board ſuch 'ſhips, *intereſt or no intereſt*, or, *without further proof of in- 'tereſt than the policy*, or, by way of gaming or wager- 'ing, or, *without benefit of ſalvage to the inſurer*, and that 'every ſuch inſurance ſhall be void.'

By 19 *G.* II. c. 37, § 1. No inſurance ſhall be made on the ſhips or goods of his Majeſty, or any of his ſubjects, intereſt or no intereſt, &c.

But,

§ 2. Except on privateers.

But, by § 2, 'It is provided, That inſurances on pri-'vate ſhips of war, fitted out by any of his Majeſty's 'ſubjects, ſolely to cruiſe againſt his enemies, may be 'made by or for the owners thereof, intereſt or no in-'tereſt, free of average, and without benefit of ſalvage 'to the inſurer.'

§ 3. And except as to effects imported from the dominions of *Spain* or *Portugal*.

And by § 3, it is alſo provided, 'That any effects 'from any port or places in *Europe* or *America*, in the 'poſſeſſion of the crowns of *Spain* or *Portugal*, may be 'inſured in the ſame manner as if this act had not been 'made.' (*a*)

§ 5. Money lent on bottomry or *reſpondentia*, in the *Eaſt India* trade, ſhall be lent only on the ſhip or goods, and inſured only by the lender.

By ſect. 5, 'All ſums of money lent on bottomry or 'reſpondentia, upon ſhips belonging to his Majeſty's ſub-'jects, bound to or from the *Eaſt Indies*, ſhall be lent only 'on the ſhip, or on the merchandize or effects on board, 'or to be laden on board, and ſhall be ſo expreſſed in 'the condition of the bond; and the benefit of ſalvage 'ſhall be allowed to the lender, his agents or aſſigns, who alone

(*a*) The reaſon of this exception is not very obvious. That aſſigned for it is, that *Spain* and *Portugal* have each prohibited all trade between the ſubjects of foreign ſtates and their reſpective colonies in *America*. *Park* 274. But it does not follow from thence that *Britiſh* ſubjects might not import goods from *Spain* and *Portugal*. Certain it is that a great trade is generally carried on with both thoſe countries, by *Britiſh* ſubjects in their own names.—The true reaſon for this exception ſeems to be, that perſons carrying on a contraband trade with thoſe countries, might inſure their goods without diſcloſing the particular commodities of which they conſiſted; which, without this exception, they muſt have done, in order to prove an intereſt. *Emerigon* (vol i, p. 212) ſays, that the reaſon of this exception in the *Engliſh* ſtatute is ſufficiently obvious: Namely, that the *Engliſh*, who practice ſmuggling in thoſe countries, can obtain no bills of lading, or other evidence of their cargoes. He admits, however, that the ſame practice is permitted in *France*, not *by law*, but by an *evaſion of the law*. Lord *Mansfield* is ſtated by Mr. Juſtice *Buller* to have given nearly the ſame reaſon for this exception. Vid. 2 *T. R.* 165.—Vid. *Thelluſon* v. *Fletcher*, inf. 105.

'alone ſhall have a right to make inſurance on the money 'ſo lent; and the borrower ſhall recover no more on any 'inſurance than the value of his intereſt in the ſhip, or 'in the goods on board, excluſive of the money ſo bor- 'rowed: And in caſe it ſhall appear that the value of 'his ſhare in the ſhip, or in the goods on board, doth 'not amount to the ſum borrowed, he ſhall be reſponſi- 'ble to the lender for ſo much of the money borrowed 'as he hath not laid out in the ſhip or goods on board, 'with intereſt for the ſame, together with the inſurance 'and all other charges thereon, in the proportion which 'the money not laid out ſhall bear to the whole money 'lent, notwithſtanding the ſhip and goods be totally 'loſt.'

The borrower ſhall not recover on any inſurance more than the value of his intereſt in the ſhip and goods excluſive of the money borrowed. If this do not amount to the ſum borrowed, he ſhall be reſponſible for the deficiency, tho' the ſhip be loſt.

And, by ſect. 6, 'In all actions brought by the in- 'ſured, the plaintiff, or his attorney or agent, ſhall, within 'fifteen days after he ſhall be required ſo to do, in writing, 'by the defendant or his attorney or agent, declare in 'writing what ſum or ſums he hath inſured, or cauſed 'to be inſured in the whole, and what ſums he hath bor- 'rowed at reſpondentia or bottomry, for the voyage or 'any part of the voyage in queſtion.'

The plaintiff in any action on a policy, ſhall, in fifteen days after requeſt, declare how much he has inſured in the whole, and how much borrowed on bottomry.

The regulations and reſtrictions of this ſtatute, being confined to inſurances on ſhips belonging to his Majeſty and his ſubjects, and to goods or effects laden thereon, inſurances upon the ſhips and goods of foreigners are not within the act, but remain the ſame as before the paſſing of it, as appears by the following caſe.

The reſtrictions of this act do not extend to foreign ſhips, or to goods on board them.

An inſurance was made on goods on board three *French* ſhips, "from *St. Domingo* to *Bourdeaux*, all or "any of them; the goods by agreement to be valued at "a certain ſum; the policy to be deemed *ſufficient proof* "*of intereſt* in caſe of loſs."—The declaration averred that goods, to the amount of the ſum inſured, were ſhipped on board the three ſhips, *ſome or one of them*, and that two of them had been captured, and the other loſt. —After judgment by default, and a writ of inquiry executed, the defendant moved to ſet aſide the inquiſition, on the ground that damages had been aſſeſſed to the full amount

In a policy on a *foreign* ſhip, there is a ſtipulation that the policy ſhall be ſufficient proof of intereſt. Upon a writ of inquiry after judgment by default, the plaintiff need not give any evidence of intereſt.

Thelluſon v. *Fletcher*, *Doug.* 301.

amount of the defendant's ſubſcription, without any proof of the value, or any other evidence, except the defendant's hand-writing to the policy; and that, in fact, the inſured had no intereſt.—The court held, that this policy was not within the ſtatute, foreign ſhips not being included in it, on account of the difficulty of bringing witneſſes from abroad to prove the intereſt; and that, by ſuffering judgment to go by default, the defendant had confeſſed the plaintiff's title to recover; and the amount was fixed by the ſtipulation in the policy.

An inſurance cannot be made on goods, to depend on the fate of the ſhip.

An inſurance cannot be made upon one thing, to depend on the fate of another. If the ſubject matter of an inſurance be unconnected with the event inſured againſt, the policy, if not altogether nugatory, is at leaſt a wager policy. As if a cargo be inſured, and money be expended in reclaiming it upon the ſhip being captured, and this money be, by the court of Admiralty, made a charge upon the cargo: This cargo cannot be inſured upon the event of the *ſhip*'s arrival at her port of deſtination; for this, as to the ſhip, is a mere wager; and as to the cargo, the underwriters are not liable to any peril to which it is expoſed.

Money is expended in reclaiming a cargo on board a captured ſhip, which is made a charge upon the cargo. This money is inſured upon the cargo, upon the event of the *ſhip*'s arrival at her port of deſtination. The ſhip being again captured and reſtored upon appeal, relinquiſhes the voyage inſured, and is afterwards loſt.—The policy being on the *goods*, and the inſurance being upon the *ſhip*'s

Thus:—Goods were inſured on board the *Emanuel*, "at and from *Falmouth* to *Marſeilles*, warranted a *Da-*"*niſh* ſhip."—On the policy was this memorandum:—"The following inſurance is declared to be on money "expended for reclaiming the ſhip and cargo, valued at "the ſum which ſhall be declared hereafter. The loſs "to be paid in caſe the ſhip does not arrive at *Marſeilles*, "and without farther proof of intereſt than this policy; "warranted free from average, and without benefit of "ſalvage."—The inſured were proprietors of the *cargo*, but not of the *ſhip*. The ſhip had ſailed originally with the cargo from *Riga* on a voyage to *Marſeilles*, was captured by an *Engliſh* privateer, and condemned.—The ſentence of condemnation was afterwards reverſed, the prize being proved to be a *neutral ſhip*; but the expenſes were ordered by the Admiralty to be a charge upon the cargo.

cargo. The plaintiff's agents paid theſe expenſes, amounting to 1031 l. 14s., and immediately procured the above inſurance to be effected. In *February* 1781, the ſhip ſailed from *Falmouth*, with the original cargo on board, in the proſecution of her voyage to *Marſeilles*, but was captured by a *Spaniſh* ſhip, and carried into *Ceuta*, where ſhe was again condemned. An appeal was brought, and the cargo, being of a periſhable nature, was ordered to be ſold, and the proceeds brought into court, to wait the event of the ſuit. In *May* 1783, the ſhip was reſtored by ſentence of the court of appeal. After deducting the expenſe of proſecuting the appeal in *Spain*, the ſurplus, amounting to no more than twenty-ſix rix dollars, was paid to the owners. As ſoon as the ſhip was liberated, ſhe ſailed from *Ceuta* to *Malaga* to refit, and having there made the neceſſary repairs, ſhe ſailed for *Bremen*, and in that voyage was loſt.—The cargo had been inſured at *Bremen*, for the original voyage from *Riga* to *Marſeilles*, and the amount of that inſurance was paid.—In an action on the above policy, the loſs was averred to be by *capture*. On the trial, it was objected, not only that the plaintiffs could not recover, as for a loſs by *capture*, (*a*) but alſo that this was not an *inſurable intereſt*; for if the inſurers at *Bremen* were anſwerable for the expenſes that had been incurred in reclaiming the goods, the preſent contract would amount to a *double inſurance*, and would be conſequently void.—The plaintiffs were nonſuited upon theſe objections; and upon a motion to ſet aſide the nonſuit, the court held both objections to be well founded.—Lord *Mansfield* ſaid,—"The intereſt on which the plaintiffs effected this policy, was money laid out in reclaiming the *cargo*. The event inſured was the arrival of the *ſhip* at *Marſeilles*. A loſs accrued upon the *cargo*. The underwriter is ſued, and the loſs is averred to be by *capture*. The ſhip was taken by the *Spaniards*, but afterwards reſtored, and in a condition to purſue her voyage, but was loſt

arrival, is a wager, and void.

Kulen Kemp v. *Vigne*, 1 T. R. 304.

(*a*) As to this point vid. *inf.* c. 16, § 2.

loſt *in another voyage.*—This is a wager policy, and juſt the ſame as if the event inſured had been the arrival of any other ſhip at *Marſeilles*. The plaintiffs were intereſted in the *cargo alone*; but the event inſured is the arrival of the *ſhip*, and not of the cargo. There was only a temporary capture, and though this, by conſtruction, is ſuch a loſs, as that an inſured *upon intereſt* is warranted in abandoning at the time, if he pleaſe; yet we muſt conſider what the truth of the caſe was between thoſe parties. Now this was a wager policy, and in ſuch a caſe, there can be no abandonment. But what alone is a fatal objection to the plaintiff's claim is, that they did not attempt to purſue the voyage to *Marſeilles*, which they might have done. Nor is it any excuſe that they could no longer control her deſtination; for in wager policies the inſured take upon themſelves to perform all that the owners could have done in the ſame ſituation." —Mr. Juſtice *Buller* ſaid,—"The parties who were intereſted in the cargo *alone*, inſured the *ſhip*, with which they had no concern. The goods might have arrived ſafe, and the ſhip have been loſt, and then they would have been entitled to recover as for a total loſs; though they had ſuſtained no damage. On the other hand, if the ſhip had arrived, and the goods had been loſt, they could have recovered nothing, though they would have really ſuſtained a damage. The policy, therefore, is not adapted to the real truth of the caſe, but is a wager policy, and that alone is deciſive upon the ground of merits. (*a*)

In wager policies the inſured takes upon himſelf to perform all that the owner could have done.

The exception in the third ſection of the act, relating to effects imported from the dominions of *Spain* and *Portugal*, enables the inſured upon that trade, though carried on in *Britiſh* ſhips, to recover without the proof of any intereſt.—Therefore where an inſurance was made, "Upon "any of the packet boats that ſhould ſail from *Liſbon* to "*Falmouth*,

(*a*) It ſeems extraordinary that, if this was taken to be a wager policy on the ſhip, the counſel for the plaintiff did not avail themſelves of her being a *foreign ſhip*, to ſhew that a policy without intereſt upon her was not within the ſtat. 19 *G.* II. c. 37.

"*Falmouth*, for one year, upon any kinds of goods or "merchandize whatſoever: And it was agreed that the "goods *ſhould be valued at the ſum inſured on ſuch packet* "*boat, without further proof of intereſt than the policy*; and "to make no return of premium for want of intereſt, being "on bullion or goods." The inſured had an intereſt in bullion on board one of the *Liſbon* packets, which was totally loſt within the time mentioned in the policy.—The court held, that this was a policy of a peculiar ſort, and good within the exception of the ſtat. 19 *G.* II. c. 37, § 8. (*a*) That it was a mixed policy, partly a wager policy, and partly an open one; and being a valued policy, and fairly ſo, without fraud or miſrepreſentation, and the loſs having happened, the inſured was entitled to recover as for a total loſs.

A policy "*without further proof of intereſt than the policy*," on goods from *Liſbon*, is good, within the 3d ſection of the act.

Da Coſta v. *Frith*, 4 *Bur.* 1966, *infra* c. 13. § 5.

Though the inſured has an intereſt in the thing inſured, yet if it be ſmall in compariſon of the ſum inſured, the object of the contract will be conſidered, not as an indemnity, but as a wager; and its being made in the form of a ſpecial agreement, will not take it out of the ſtatute.

A ſmall intereſt will not take a caſe out of the ſtatute.

Thus, where an action was brought by the ſurgeon of an *Eaſt Indiaman*, againſt a paſſenger, upon a ſpecial agreement, "that, in conſideration that the plaintiff had agreed to pay the defendant 20l. at the next port the ſhip ſhould arrive at, the defendant undertook that the ſhip ſhould ſave her paſſage to *China* that ſeaſon; and in caſe ſhe did not, he would pay the plaintiff 1000l. at the end of one month after the ſhip's arrival in the *Thames*."—The defendant paid the 20l. into court.—At the trial it appeared that the plaintiff had paid the defendant the 20l. at the next port; that the ſhip, being delayed below *Madras*, in conſequence of a miſcalculation of five days in the reckoning, and the monſoons ſetting in earlier than uſual, ſhe loſt her paſſage: That the plaintiff had *ſome goods* on board, which were liable to ſuffer by the loſs of the ſeaſon: That while the matter remained doubtful, the plaintiff, by the deſire of the captain, would have cancelled the agreement, but the defendant

An agreement, in conſideration of 20l. to pay 1000l. if a ſhip did not ſave her paſſage to *China*, is a wager inſurance within the act, though the party have *ſome* goods on board.

Kent v. *Bird*, *Cowp.* 583.

(*a*) Sup. 104.

defendant poſitively refuſed.—The jury found a verdict for the plaintiff, damages 980l.—Upon a motion for a new trial, it was contended, on the part of the defendant, that this was a wager inſurance within the ſtat. 19 *G.* II. c. 37, and of this opinion were the court.—Lord *Mansfield* ſaid,—"The ſtatute, under general words, prohibits all contracts of inſurance by way of *gaming* or *wagering*.—Here the plaintiff gave ſo much to the defendant, in conſideration that if the ſhip ſhould not ſave her paſſage to *China*, he was to receive 1000 l. on her ſafe return to *England*.—This was clearly *wagering*; and, if it were allowed, all wager policies would be turned into this form, and the act be entirely defeated.

A valued policy is often only a colour for a wager one.

In a valued policy, the proper effect of the valuation is the fixing the amount of the prime coſt, in the ſame manner as if the parties had admitted it at a trial; but, for every other purpoſe, it muſt be taken that the value was fixed in ſuch a manner, as that the inſured meant to have an indemnity only, and no more. (*a*) And though this, when fairly made, is diſtinguiſhable from a wager policy, where the inſured has avowedly no intereſt at all; yet it too often happens that, under colour of a ſmall intereſt, and in the form of a valued policy, many inſurances which are, in truth, mere wagers, are effected, and the beneficial purpoſes of the ſtat. 19 *G.* II. c. 37, thereby evaded.

But though it has been holden that, in the caſe of a valued policy, the inſured, to take it out of the ſtatute, needs only to prove *ſome* intereſt, without ſhewing the amount, becauſe that is admitted by the inſurer; yet, if it appear that the intereſt proved is a mere cover to a wager, as that a man who inſures for 2000 l. has intereſt on board to the value of a cable only; this would be a mere evaſion, and the contract unqueſtionably void. (*b*)

But where the inſurance is meant as an indemnity, and not a wager, a valued policy is not within the act.

But where the inſurance is fairly meant as an indemnity, and there is no ground to believe that it is intended as

(*a*) *Per* Lord *Mansfield*, 2 *Bur.* 1171. Vid. inf. c. 7. § 1.—(*b*) *Per* Lord *Mansfield* in *Lewis* v. *Rucker*, 2 *Bur.* 1171. inf. c. 14. § 2.

as a cover to a wager, a valued policy is not within the ſtatute; and the courts will not inquire very minutely whether the valuation be very near the true intereſt of the inſured.

In the caſe of *Le Cras* v. *Hughes*, which has been already particularly noticed, (*a*) the court of King's Bench ſeems to have carried this indulgence much farther, when they declared that in caſes where the intereſt of the inſured is leſs than the ſum inſured in a valued policy, it is the conſtant uſage, upon a *total loſs*, to pay the whole ſum inſured; but, upon a *partial loſs*, to conſider it as an *open policy*, and to compute the loſs according to the value of the *goods on board*.—That ſuch has been the uſage is unqueſtionably true, and that it has been ſanctioned by the approbation of great and eminent judges, as in the caſe alluded to, is equally true: But how it can be reconciled with the proviſions of the ſtat. 19 *G.* II. c. 37, is not quite ſo clear. That this practice has a direct tendency to intereſt the inſured, if not in procuring fraudulent loſſes, at leaſt to endeavour to convert every loſs into a *total one*, is moſt manifeſt. In the following caſe this doctrine ſeems to have been carried ſtill farther; a value being ſet in the policy upon a mere contingency.

The practice of permitting the inſured upon a valued policy to recover the whole ſum inſured, upon a total loſs, though his intereſt be leſs than that ſum, is againſt the ſtat. 19 *G.* II. c. 37.

An inſurance was made, "Upon any kind of goods and merchandizes, &c. and upon the body of the ſhip *Providence*, at and from *Surrinam* to *Quebec*. The ſaid goods and merchandizes, for ſo much as concerns the inſured, by agreement are valued at 1000l. *being the profits expected to ariſe on the cargo of the above ſhip, in the event of her ſafe arrival at Quebec*; and, in caſe of loſs, the inſurers agree to pay the ſame, without any other voucher than the policy."—The intereſt proved at the trial was the *profit*, to the amount of the ſum inſured, which would have ariſen to the plaintiff, upon a cargo of molaſſes, he having a contract with government to ſupply the army in *Canada* with ſpruce beer.—It was objected at the trial, that this was a wager policy, within the ſtat. 19 *G.* II. c. 37.—This point being reſerved for the opinion

A valued policy on profits expected upon a voyage, is not within the act, the object of the inſurance being an indemnity.

Grant v. *Parkinſon*, M. 22 *G.* III. B. R. MS.

(*a*) Sup. 84.

opinion of the court, it was determined in favour of the plaintiff.—Lord *Mansfield*, in delivering the opinion of the court, ſaid,—"On the conſtruction of the act, a valued policy is not void. Since the act, it is incumbent on the plaintiff to prove *ſome intereſt*, but it is not neceſſary for him to go into the whole value. The inſurance being on the profits of a cargo (*a*) belonging to a man having a contract to ſupply the army, if it had arrived ſafe, the profits were pretty certain. The meaning of the policy was, not to evade the act, but to avoid the difficulty of going into an exact account of the *quantum*. This cannot be diſtinguiſhed from a valued policy, and there is no pretence to ſay that it was a wagering one."(*b*)

So, a valued policy on a commiſſion expected as conſignee of a cargo, is not a wager.

So, where the intereſt was declared by the policy to be *on the commiſſion of the plaintiff*, as conſignee of the cargo, valued at 1,500l., Lord *Kenyon* expreſſed a very ſtrong opinion that this was a good inſurable intereſt.

Flint v. *Le Meſurier*, at *N. P.* after *Hil.* 1796. *Park* 268.

Sect. 3.

Of Re-inſurance.

If an inſurer deſire to be relieved from his reſponſibility, he may re-inſure the ſame riſk.

A POLICY of inſurance being once ſigned, the underwriters are bound by the terms of it; nor can they be releaſed from their contract, without the conſent of the inſured.(*c*) But if an underwriter repent of what he has done; if he be afraid to encounter the riſk he has engaged to run, or find that he has incautiouſly engaged himſelf to a greater amount than he may be able to diſcharge, he may ſhift it, or part of it, from himſelf to other inſurers, by cauſing a *re-inſurance* to be made on the ſame riſk, upon the beſt terms he can, and the new inſurers

(*a*) The inſurance was, in fact, on the *ſhip and cargo*, but declared in the policy to be on the profits expected upon the cargo.—(*b*) One principal objection to this determination is, that, if the cargo ſhould happen to come to a falling market, and the goods ſhould be ſold at prime coſt, the policy muſt appear to have been without intereſt.—(*c*) 1 *Emerigon*, 8. *Roccus*, n. t. n. 12.

inſurers will be reſponſible to him in caſe of loſs, to the amount of the re-inſurance. (*a*) But the new inſurers, in ſuch caſe, are anſwerable to the original underwriter only, and not to the original inſured, who can have no remedy againſt him, in caſe of loſs, even though the original inſurer become inſolvent; becauſe there is no privity of contract between the original inſured and the re-inſurers. If, therefore, the original inſurer fail, ſo that the original inſured receive only a dividend, however ſmall, the re-inſurer can gain nothing by this, but muſt pay the full amount of the loſs to the original inſurer. (*b*) *Aſſecurator poſt factam aſſecurationem poteſt ſe aſſecurari facere ab alio aſſecuratore; et iſte ſecundus aſſecurator tenetur pro aſſecuratione facta à primo, et ad ſolvendum omne totum quod primus aſſecurator ſolverit, et iſta ſecunda aſſecuratio valet.* (*c*)

But the re-inſurer is only reſponſible to the original inſurer and not to the original inſured.

Thus ſtands the law on this ſubject, in moſt of the commercial ſtates of *Europe*. But in this country it was found, about the time when the ſtat. 19 *G.* II. *c.* 37 was made, that this mode of inſurance, though perfectly reaſonable, when confined to its proper object, had been perverted from its original uſe, and was employed as a mode of ſpeculating in the riſe and fall of premiums; and the legiſlature foreſeeing that it might be uſed as a colour for wager policies, and a means of evading the proviſions of that act, declares, (ſect. 4.) 'That it ſhall 'not be lawful to make re-inſurance, unleſs the inſurer 'ſhall be inſolvent, become bankrupt, (*d*) or die; in either 'of which caſes, ſuch inſurer, his executors, adminiſ-'trators,

But in *England*, by the 19 *G.* II. c. 37. § 4, re-inſurances are prohibited, except in caſe of the inſolvency or death of the originalinſurer.

(*a*) Vid. *Le Guidon*, c. 2. art. 19, 20. *Valin*, h. t. art. 20, p. 65. *Pothier*, h. t. n. 96.—(*b*) Vid. *Emerig.* tom. 1, p. 248. —(*c*) *Roccus*, h. t. n. 12.—(*d*) By the 19 *G.* II. c. 32, § 2. 'When the obligor in any bottomry or *reſpondentia* bond, and 'the inſurer in any policy of inſurance, becomes bankrupt, be-'fore any loſs happens, the obligee in ſuch bond, and the in-'ſured in ſuch policy of inſurance, may prove their debts and 'loſſes under the commiſſion, and receive a dividend; and the 'bankrupts ſhall be diſcharged from ſuch debts, in like manner 'as if the loſs had happened before ſuch bankruptcies.'—Vid. *inf.* c. 16, § 6, art. 5.

'trators, or aſſigns, may make re-inſurance to the amount 'of the ſum before by him inſured; provided it be ex- 'preſſed in the policy to be a re-inſurance.'

This clauſe extends not only to *Britiſh*, but alſo to foreign ſhips.

This clauſe, having no words to confine its operation to ſhips belonging to *Britiſh* ſubjects, like the firſt clauſe of the act, reſtraining inſurances, *intereſt or no intereſt*, (*a*) extends to re-inſurances made in *England* on foreign ſhips, even when they are inſured abroad. This has been ſo determined; though it is obſervable that the following caſe, in which that queſtion was made, was not the ſpecies of re-inſurance above deſcribed, and to which only the ſtatute refers, but a *ſecond inſurance*, effected on account of the *original inſured*. (*b*)

Therefore, a ſhip inſured at *Marſeilles* cannot be again inſured here, unleſs the firſt inſurer be inſolvent or dead.

That was the caſe of an inſurance made in *London*, on a *French* veſſel, which had before been inſured at *Marſeilles* for the ſame ſum, by an inſurer there, who, at the time of ſubſcribing the ſecond policy, was living and ſolvent, and who, in fact, afterwards paid the ſum inſured by him.—Upon this caſe the court determined that the latter policy was void, by the words of the act; for though the firſt clauſe of the act, which prohibits inſurances, 'intereſt or no intereſt,' is confined to inſurances on *Britiſh* ſhips, yet the fourth ſection being general, and without any ſuch reſtrictive clauſe, every re-inſurance in this country, either by *Britiſh* ſubjects or foreigners on *Britiſh* or foreign ſhips, is declared void by the ſtatute, unleſs the firſt inſurer be inſolvent, become bankrupt, or die.

Andree v. *Fletcher*, 2 T. R. 161.

Two other kinds of re-inſurance.

There are two other kinds of re-inſurance; the one where the inſured inſures the ſolvency of the inſurers; the other where he makes a new inſurance in conſequence of the inſolvency of an inſurer during the continuance of the riſk.

Inſurance of the ſolvency of the inſurer.

The inſurance of the ſolvency of an inſurer is permitted and practiſed in ſome foreign countries; (*c*) but it ſeems never to have been in uſe among us; not, perhaps, as has been ſuppoſed, (*d*) becauſe the ſolvency of

(*a*) Sup. 103.—(*b*) Vid. inf. 118, where Lord *Mansfield* diſtinguiſhes a re-inſurance from a double inſurance.—(*c*) Vid. *Le Guidon*, c. 2, art. 20, Ord. of *Louis*, XIV. h. t. art. 20, *Valin*, h. t. 65, 2 *Magens*, 190, 419.—(*d*) *Park* 280.

of an underwriter is not an insurable interest, or that such an insurance would be deemed a wager; but, more probably, because the insolvency of an insurer seldom happens in *England*; besides, a *double insurance* would better answer the end proposed.

The practice in *France* in case of the insolvency of an insurer.

In *France*, if an insurer fail during the continuance of the risk, the insured may insist on the dissolution of the contract, unless the creditors of the insolvent insurer, in order to entitle themselves to receive the premium, (which is rarely paid in that country till after the risk is ended,) will give security for the payment of the sum insured, in case of loss. At *Marseilles*, (for in *France* different practices prevail in different provinces,) the insured, in such case, sues the insolvent insurer till he obtains a sentence authorizing him to re-insure at the expense of the insolvent, which he may deduct from the stipulated premium, if it be not paid, and if this be insufficient, then out of the effects of the insolvent. (*a*)

Sect. 4.

Of Double Insurance.

How double insurance differs from re-insurance.

DOUBLE insurance is where the insured makes two insurances on the same risk, and the same interest. It differs from a re-insurance in this, that it is made by the *insured*, in order that he may be entitled to receive a double satisfaction in case of loss; whereas a re-insurance is made by a former insurer, his executors or assigns, to protect himself and his estate from a risk to which they were liable by the first insurance. A re-insurance, except in the cases permitted by the stat. 19 *G.* II. c. 37, § 4, is absolutely void; but a double insurance, though it be made with a view to a double satisfaction in case of loss, and is therefore in nature of a wager, is not void by the law of *England*. The two policies are considered as making but *one insurance*. They are good to the extent of

Though it is in nature of a wager, yet it is not void. But the insured can only recover one satisfaction on both policies.

(*a*) *Valin*, h. t. art. 20, p. 65. *Pothier*, h. t. n. 190. *Emerig.* tom. 1, p. 254.

of the value of the effects put in riſk: But the inſured ſhall not be permitted to recover a double ſatisfaction. He may ſue the underwriters on both the policies, but he can only recover the real amount of his loſs, to which all the underwriters ſhall contribute in proportion to their ſeveral ſubſcriptions. And therefore, if he ſhould content himſelf with ſuing only on one of the policies, the underwriters on that policy may recover a rateable contribution from thoſe on the other. (*a*)

Thoſe who pay the loſs may recover a rateable proportion from the other inſurers.

This was ſo ruled by Lord *Mansfield*, in the year 1763; and it was then agreed to be the courſe of practice, that, upon a double inſurance, though the inſured is not entitled to two ſatisfactions; yet, that in an action upon the firſt policy,

Newby v. *Reed*, at *N. P.* 1 *Bl.* 416.

(*a*) *Le Guidon*, ch. 2, art. 16 and 18, ch. 3, art. 3, lays it down that if there be ſeveral policies on the ſame cargo, thoſe of prior date ſhall be preferred. If there be an over-inſurance in one policy, it ſhall not be reduced rateably upon all, but the latter inſurers, whether for gain or loſs, ſhall withdraw their ſubſcriptions, on receiving one half *per cent.* The Ord. of *Amſterdam*, art. 20, 23, agrees with the law of *England* in this; that all the inſurers, upon ſeveral policies, ſhall participate equally in profit and loſs.—The Ord. of *Louis* XIV. h. t. art. 23, 24, 25, declares that if the ſum inſured by a *ſingle policy*, without fraud, exceed the value of the goods, the policy ſhall be good to the extent of their true value: and in caſe of loſs, every inſurer ſhall contribute in proportion to his ſubſcription, and return the premium upon the ſurplus. If the inſurance be by ſeveral policies, and the firſt amount to the value of the goods, it ſhall ſtand alone, and the underwriters upon the others ſhall be diſcharged, and *return the premium*, ſubject to the uſual deduction.—If the firſt policy be not ſufficient to cover the full value, the ſecond ſhall anſwer for the deficiency.—If there be ſeveral *dates* to the ſeveral ſubſcriptions in the ſame policy, each date makes a ſeparate contract, and aſcertains the liability of each underwriter.—But if ſeveral policies have the ſame date, they make but one policy; Vid. *Valin* ſur art. 24, &c. p. 69, *Pothier*, h. t. n. 77, *Cleirac*, p. 243, *Emerig.* tom. 2, p. 163.—Vid. alſo *Mal.* lex. merc. 118, where he lays it down that if the effects be over-inſured, the loſs ſhall fall on the firſt underwriters, and the reſt ſhall return their premium, deducting one half *per cent.* This, he ſays, is founded on the cuſtom of merchants, which in matters of inſurance is more to be regarded than the law. Vid. inf. c. 15, § 1. n. 1.

policy, he may recover the whole ſum inſured, and may leave the defendants therein to recover a rateable ſatisfaction from the other inſurers.

The two following caſes will alſo ſerve to ſhew Lord *Mansfield*'s ſentiments more fully on this ſubject.

Rogers v. *Davis*, at *N. P.* in *Mich.* 17 *G.* III. *Beawes*, lex merc. 242.

The firſt was a valued policy on a ſhip and freight, and on goods, as intereſt might appear, from *Newfoundland* to *Dominica*, and from thence to the port of diſcharge in the *Weſt Indies*.—The ſhip ſailed from *St. John*'s on the 17th of *December* 1775, and the plaintiff declared as for a total loſs. The defendant underwrote for 200l. and paid into court 124l. This ſum was paid on a ſuppoſition, that the underwriters on a former policy ſhould bear a ſhare of the loſs. The plaintiff had originally inſured at *Liverpool*, on a voyage "from *Newfoundland* to *Barbadoes* and the *Leeward Iſlands*," with an exception of *American* captures; but the plaintiff afterwards, for the purpoſe of ſecuring himſelf againſt captures, and having altered the courſe of his voyage, made the preſent inſurance.—The plaintiff now inſiſted, that he was entitled to receive the full amount of his inſurance againſt the defendant, and not to any part from the *Liverpool* underwriters, becauſe the voyage now inſured was different from that inſured at *Liverpool*. (*a*) There was a verdict for the plaintiff for his full demand, *leaving the defendant at liberty to bring an action againſt the* Liverpool *underwriters, if he thought fit.*

An underwriter who has paid a loſs upon one policy, may ſue the underwriters on the other for contribution.

Davis v. *Gildart*, at *N. P.* after *Eaſt.* 17 *G.* III. *Beawes* ub. ſup.

Accordingly in the *Eaſter* term following, *Davis*, who had been the defendant in the laſt action, brought an action againſt the preſent defendant, who was an underwriter upon one of the *Liverpool* policies, in order to recover a contribution for the loſs which the preſent plaintiff had been obliged to pay.—It was agreed by both parties to admit, that on the *London* policy, (which was the ſubject of the former action,) 2200l. were inſured: That on the two *Liverpool* policies 1700l. were inſured: That the merchant was intereſted to the amount of 500l. on the

(*a*) This fact does not ſeem to have been much regarded either in this or the following caſe.

the ſhip, 300l. on the freight, and 1400l. on the cargo: That the plaintiff had paid 200l. loſs, and 47l. for the coſts. The whole intereſt was 2200l., and the whole inſurance was 3900l.—The queſtion was, whether the defendant was liable to contribute any thing, and what. It was inſiſted by the counſel for the defendant, that the inſurance in *London* was an illegal *re-inſurance*; and therefore the plaintiff might have made a good defence in an action brought againſt him: And if ſo, he could not now recover over, againſt the defendant, in the preſent action. —Lord *Mansfield* ſaid,—"The queſtion ſeems to be whether the inſured has not two ſecurities for the loſs that has happened. If ſo, can there be a doubt that he may bring his action againſt either? It is like the caſe of two ſureties; where, if all the money be recovered againſt one of them, he may recover a proportion from the other. Then this would bring it to the queſtion, whether the the ſecond inſurance is void as a *re-inſurance*. But a re-inſurance is a contract made by the inſurer to ſecure himſelf; *and this is only a double inſurance.*"

Formerly in the caſe of an *over inſurance*, the firſt underwriters were liable to the extent of the loſs, and the reſt diſcharged.

Yet, from the following deciſion it will appear, that, in the caſe of an *over-inſurance*, that is, where, in a ſingle policy, the ſums ſubſcribed amount to much more than the value of the effects inſured, the firſt underwriters on the policy were formerly holden to be anſwerable, to the extent of the loſs, and the ſubſequent ones diſcharged.

The *African Company* v *Bull*, 1 *Show.* 132, *Gilb.* 238.

To an action brought on a policy on goods, the defendant pleaded a *cuſtom of merchants*,—"That where a policy is ſubſcribed by a number of underwriters, and the goods are not equal in value to the ſums ſubſcribed, the underwriters, in caſe of loſs, ſhall be liable in the order in which they ſubſcribe; and that the remaining underwriters ſhall be exonerated from all reſponſibility, and return the premium, deducting one half *per cent.*" The plaintiff replied that this was ſo, if none were inſolvent, and traverſed the cuſtom as pleaded.—It is ſtated that at the trial the cuſtom was proved plainly and fully, "*by all the Exchange*;" and the court held the cuſtom reaſonable, and judgment was given for the defendant.

It appears from the argument of this caſe, that ſuch inſurances are made when a merchant does not know whether

whether his factor will ſend home any goods, or how much.—But the cuſtom here proved *by all the Exchange* ſeems now to be forgotten; for at preſent the underwriters, upon a policy in which there is an over-inſurance, would be held all liable in proportion to their ſeveral ſubſcriptions, without any regard to priority of dates.

Though the ſame perſon cannot, upon a double inſurance of his full intereſt, by different policies, recover more than one ſatisfaction; yet, according to the following caſe, if the ſame perſon be not to have the benefit of both policies in all events, it cannot be deemed a double inſurance; and different perſons may inſure the ſame thing upon diſtinct intereſts, to the amount of ſuch intereſts, even to the full value of the thing inſured, and each may recover to that amount. (*a*)

Though only a ſingle ſatisfaction can be recovered on a double inſurance by the ſame perſon, yet different perſons may inſure the ſame thing, and each recover the full value of the thing inſured.

Meybohm, a merchant of *Peterſburgh*, correſponded with *Amyand* of *London*, to whom he was conſiderably indebted. *Amyand* ſent a ſhip to *Peterſburgh* for goods, which *Meybohm* ſent, and promiſed to ſend the bill of lading by the next poſt, but never ſent it. *Amyand* inſured 1400 l. with private underwriters on theſe goods, on or before the 28th of *September*. In *October* he received a letter from *Meybohm*, dated the 7th of *September*, informing him that he ſhould ſend him goods as per invoice, and deſiring him to inſure; and 900 l. were inſured in conſequence. The two inſurances, therefore, amounted to 2300 l. on goods. After ſending this letter, *Meybohm* indorſed the bills of lading to one *Tameſz*, who ſent them indorſed to *Uhthoff*, his correſpondent in *London*, deſiring him to inſure the *whole*. *Uhthoff* received the bills of lading on the 15th of *November*, and then inſured with the defendants, (the *London* aſſurance company,) for 2300 l. "at and from the *Sound* to *London*," acknowledging that there had been a former conſignment of the goods, and an inſurance thereon, and that both parties were willing to be ſafe. In the voyage, the ſhip and cargo were totally loſt.—An action was brought by the plaintiffs, as truſtees of *Tameſz*, againſt the defendants on their policy, and a verdict was found for the plaintiff for the whole ſum inſured by *Tameſz*, ſubject to the opinion of the court upon the above caſe.—The queſtion was whether the

A. at *Peterſburgh*, being conſiderably indebted to *B.* his correſpondent in *London*, ſhips goods to *B.* and promiſes to ſend him the bill of lading.—*B.* on this inſures 1400 l. on theſe goods. Afterwards *A.* informs him that he has ſhipped goods for *London*, and deſires him to inſure, and he inſures 900 l., in all 2300 l. on theſe. After this, *A.* having ſhipped the goods, indorſes the bills of lading to *C.* at *Peterſburgh*, who ſends them to his correſpondent in London, with directions to inſure the whole. *D.* accordingly inſures 2300 l. for *C.* with different inſurers, and gives them

(*a*) Vid. ſup. 80.

notice of the former inſurances on the ſame goods by *B.*—The goods are totally loſt in the voyage. *C.* ſhall recover on *his* inſurance the *whole* ſum inſured, notwithſtanding *B.*'s inſurance, who had alſo an inſurable intereſt.

Godin & al. v. *Lond. Aſſur.* 1 *Bur.* 489, 1 *Bl.* 103.

the plaintiffs, as truſtees for *Tameſz*, ought to recover the whole, or only half the ſum inſured.—The court were unanimouſly of opinion, that the plaintiff was entitled to recover *the whole*.—Lord *Mansfield* delivered the opinion of the court to this effect. "As between the inſurer and the inſured, upon the foot of commutative juſtice merely, the inſurers were bound to pay the inſured the whole; for they have received a premium for the whole riſk. If the inſured is to receive but one ſatisfaction, natural juſtice ſays, that the ſeveral inſurers ſhall, all of them, contribute *pro rata*, to ſatisfy that loſs againſt which they have inſured. When a man makes a double inſurance of the ſame thing, by diſtinct policies, yet he ſhall only receive a ſingle ſatisfaction for the ſame loſs.—And this holds, though one or both the policies be in the names of other perſons; for the ſame perſon is to have the benefit of both. And if the whole ſhould be recovered from one, he ought to ſtand in the place of the inſured, to receive contribution from the other, who was equally liable to pay the whole. But in this caſe, if *Tameſz* was not to have the benefit of both policies in all events, then it never can be conſidered as a double inſurance. Suppoſing, as it has been ſaid, that by the indorſement of the bills of lading, *Tameſz* ſtood in the place of *Meybohm*, in reſpect of the inſurances; yet *Amyand* had an intereſt of his own, and inſured 1900 l. on ſhip and goods, prior to any directions from *Meybohm*. Various perſons may inſure various intereſts on the ſame bottom; as one perſon for goods, another for bottomry, &c. Here *Amyand* had a *lien* on theſe goods, as a factor, to whom a balance was due; and he had the ſole intereſt in the ſhip, which was a part of the things inſured. Beſides, *Amyand* does not admit that the inſurance in *October* was made on account of *Meybohm*: On the contrary, he inſiſts upon it for his own benefit. But ſuppoſing *Amyand* had made the inſurance for *Meybohm*, merely as his agent, yet, even then, *Tameſz* can neither come againſt *Amyand*'s underwriters nor come at his policy: For *Amyand*, the factor of *Meybohm*, has poſſeſſion of the policy, and appears to have been his creditor upon the balance of accounts. And it is now a ſettled point, that *a factor to whom*

If the whole loſs be recovered from one inſurer, he ought to ſtand in the place of the inſured, to receive contribution from the others.

But various perſons may inſure various intereſts on the ſame bottom.

A factor to whom a balance is due, has a lien

whom a balance is due, has a lien on all goods of his principal, so long as they remain in his possession. (*a*) So that *Amyand*, even as factor to *Meybohm*, and making the insurance on his account, is yet entitled to retain the policy, having a lien upon it, while it is in his possession, for the balance due to him from *Meybohm*.—And *Tamesz* must have paid this balance, before he could have gotten *Amyand*'s policy out of his hands; and consequently he was far from being entitled to it as a *cestui que trust*, absolutely and entirely.—But even if this were doubtful, yet *Tamesz* insured under the express declaration of his suspicion that there might have been a former insurance upon the goods by some other person; but desired to insure the whole for his own security; and to this the defendants agreed, and took the whole premium. It would therefore be neither just or reasonable, that *Tamesz* should recover only half his loss from the defendants, and be turned round for the other half to the uncertain event of a long and expensive litigation. *Tamesz*, therefore, has a right to recover the whole loss from the defendants. For though here be two insurances, yet it is not a double insurance. A double insurance is, where a full value of interest is insured on different policies by the same man. Two persons may insure different interests, in the same thing, each for the whole value. *Tamesz* is entitled to receive the whole from the defendants, whatever shall become of *Amyand*'s policy; and they will have a right, in case he can claim any thing under *Amyand*'s policy, to stand in his place, for a contribution to be paid by the other underwriters. Therefore, upon these grounds, in every light in which the case can be put, we are all clearly of opinion, that the verdict is right *for the whole*."

on all goods of his principal in his hands, and may retain the policy.

It would seem that an underwriter, who insures with notice of a former insurance, shall be liable to the whole loss.

Distinction between two insurances on different interests, and a double insurance.

To enable the defendant, in an action on a policy, to discover whether there be a double insurance, he may, by the authority of the stat. 19 *G.* II. c. 37, § 6, call upon the plaintiff to declare in writing, what sums he has insured in the whole, and how much he has borrowed on bottomry or *respondentia*.

A defendant sued on a policy may oblige the plaintiff to declare how much he has insured in the whole.

(*a*) Vid. *Kruger* v. *Wilcox*, *Amb.* 252.

CHAP.

CHAP. V.

Of the Voyage.

HAVING ſhewn who may be parties to this contract, what may be the ſubject matter of it, and what intereſt the inſured muſt have therein, we now proceed to inquire, upon what *voyage* an inſurance may be legally made.

What is meant by the voyage in inſurance.

By the voyage, is here meant, the paſſage of a ſhip upon the ſeas, from one port to another, or to ſeveral ports. The voyage, with reference to the legality of it, is ſometimes confounded with the *traffic* in which the ſhip is engaged; and is frequently ſaid to be illegal, only becauſe the trade is ſo. (*a*) But a voyage may be perfectly lawful, and yet the tranſport of certain goods on board the ſhip may be prohibited; or the voyage may be illegal, though the tranſport of the goods be lawful. It has therefore been thought proper to diſtinguiſh the voyage from the commerce carried on by it, with reference to the legality or illegality of each; and as the ſubject of inſurances upon illegal commerce has been already conſidered in its proper place, (*b*) it will be our principal buſineſs in the preſent chapter to ſhew, what voyages are, in themſelves, unlawful; and in what reſpect the illegality of a voyage affects inſurances upon the ſhip, or the goods on board.

General rule.

Upon this ſubject, as upon that of illegal commerce, it may be laid down as a general rule, that no inſurance can be legally made upon any voyage undertaken contrary to the laws of this kingdom, or to thoſe of its dependencies, or to the law of nations. And it is immaterial whether the inſurer was or was not informed, that the voyage was illegal. The law would be inconſiſtent with itſelf,

(*a*) When the contract is void on account of the illegality of the commerce, vid. ſup. ch. 3, § 1, 2, 3, 4, 5.—(*b*) Vid. ſup. ch. 3, § 1, 2.

itſelf, were it to lend its aid to enforce the performance of a contract, made in contravention of the law. (*a*)

An inſurance upon a voyage undertaken contrary to the navigation laws, is void.

Therefore an inſurance upon any ſhip or goods, for a voyage undertaken contrary to the laws made for the encouragement and protection of the *Britiſh* navigation and commerce, would be void.

So, if it be upon a voyage prohibited by the laws made for the protection of the monopoly of the *Eaſt India* company.

The laws made for ſecuring to the *India* company the monopoly of the trade to the *Eaſt Indies*, prohibit the ſhips of any other *Britiſh* ſubjects from ſailing beyond the *Cape of Good Hope*, without a licenſe from the company, and alſo prohibit the exportation of the goods of *Britiſh* ſubjects, in foreign ſhips, to the *Eaſt Indies*. Any inſurance, therefore, of any ſhip or goods, for a voyage undertaken in contravention of theſe laws, is void.—Indeed the excluſive trade of the company is ſo interwoven with the general intereſts of the ſtate, that it is not now to be conſidered ſo much the private right of a corporation, as a great national concern, the infringement of which is a public miſchief, and a public wrong, and as ſuch, is prohibited by the common law. (*b*)

Though the *penalties* of the 9 & 10 *W.* III. c. 44, have been repealed, by the 33 *G.* III. c. 52, yet a policy on a voyage undertaken in contravention of that act is void.

In treating on the ſubject of inſurances on illegal commerce, it has been ſhewn (*c*) that though, ſince the ſtat. 9 and 10 *W.* III. c. 52, many acts of parliament have been made, from time to time, ſince that ſtatute, for the regulation of the *Eaſt India* trade, and for the more effectually ſecuring the monopoly of that trade to the company, yet that act has never been wholly put an end to. And though ſuch parts of it as inflicted penalties, &c. have been repealed by the ſtat. 33 *G.* III. c. 52; and though this laſt act has provided that no acts, or parts of acts, thereby repealed, ſhall be pleaded or ſet up in bar of any action, &c.; yet it is competent to the underwriters who have ſubſcribed a policy on a ſhip trading to the *Eaſt Indies* in contravention of the ſtat. 9 and 10 *W.* 3, to

(*a*) Vid. *Bynk.* quæſt. jur. pub. lib. 1, c. 21. *Roccus*, h. t. n. 21, ſeems to entertain a contrary opinion.—(*b*) Vid. *Camden* v. *Anderſon*, 1 *Boſ.* and *Pul.* 272.—(*c*) Sup. c. 3, § 1, 2.

to avail themſelves of ſuch illegality, in defence to an action on ſuch policy. This was determined in the caſe of *Camden* v. *Anderſon* already cited on the ſubject of illegal commerce. (*a*) It needs ſcarcely to be added, that the ſame principle upon which the inſurance in that caſe was held to be void, is equally applicable to an inſurance upon a *voyage* undertaken in contravention of the laws above referred to.

Under the treaty allowing the *Americans* to trade to the *Britiſh* colonies in *India*, it is not neceſſary that thistradeſhould be carried on between *America* and *India direct*, but may be carried on *circuitouſly*, by the way of *Europe*.

By the treaty between *Great Britain* and the *United States* of *America*, concluded in the year 1795, and confirmed by the ſtat. 37 *G.* III. c. 97, it is agreed,—'That the citi-'zens of the *United States* ſhall be received into the ports 'and harbours of the *Britiſh* territories in the *Eaſt Indies*, 'and may freely carry on trade between the ſaid territo-'ries and the *United States*, in all articles of which the 'exportation or importation to or from the ſaid territories 'ſhall not be entirely prohibited.'—It then adds ſeveral regulations under which this trade may be carried on, one of which is,—'That the veſſels of the *United States* 'ſhall not carry on any part of the coaſting trade of the 'ſaid territories; but veſſels going with their original 'cargoes from one port of diſcharge to another, are not 'to be conſidered as carrying on the coaſting trade.'—From the following caſe it will appear, that, under this treaty, it is not neceſſary that this trade ſhould be carried on from *America* to the *Britiſh* ſettlements in the *Eaſt Indies direct*; but that it may be carried on *circuitouſly* by the way of *Europe*.

An *American* ſhip the property of B. and C. both *Britiſh* born ſubjects, but naturalized in *America*; (B. before, and C. who was captain, after the declaration of independence,) ſails to *France* with a cargo of goods, there diſpoſes of them, and purchaſes goods for *India*; then ſails to *Madeira*, where ſhe takes in the

Three inſurances were made; the *firſt*, on the 29th of *February* 1796, averred to be for the uſe of one *John Collet*, upon the *American* ſhip *Argonaut*, and cargo, "At "and from *Bourdeaux* to *Madeira* and the *Eaſt Indies*, "and from thence to *America*, with liberty to touch, "ſtay, and trade at all ports and places whereſoever, on "her outward and homeward voyages." The *ſecond*, on the 28th of *May* 1796, for the uſe of *Collet*, on the ſame ſhip and goods, "At and from *Bourdeaux* to the *Eaſt* "*Indies*,

(*a*) Vid. ſup. 56.

"*Indies*, with liberty to touch, call, and trade at all ports, "places, or iſlands whatſoever, as well at the *Cape of* "*Good Hope*, as on this and the other ſide of it, until her "arrival at her port of diſcharge in *Bengal*." This policy, by a memorandum, was declared to be on wines and brandies, warranted neutral. The *third*, on the 15th of *Auguſt* 1796, on account of *Collet* and one *Anthony Butler*, on goods, warranted *American*, on board the ſame ſhip, "At and from *Madeira* to her laſt port of diſ- "charge in *India*, with liberty to touch, ſtay, and trade at "all ports, places, and iſlands, as well at the *Cape of Good* "*Hope*, as on this and the other ſide of it."—In an action on all theſe three policies, the plaintiff declared as for a total loſs on each, 1ſt, by ſeizure and detention by the King's officers; and 2dly, by the perils of the ſea.—The count upon the third policy ſtated the goods to have been ſhipped at *Madeira* on the 1ſt of *June* 1796.—Upon the trial of this cauſe, the jury found a ſpecial verdict, which ſtated in ſubſtance,—"That the ſhip was the joint property of *Collet* and *Butler*; that *Collet* on the 25th of *July* 1795, ſailed in the ſhip as maſter, from *Philadelphia*, with a cargo of corn and flour, for *France*, *with a view of proceeding from thence, with the ſhip, after the diſpoſal of her cargo, to* Madeira *and the* Eaſt Indies, *and from thence back to the* United States: That before the ſhip's departure from *Philadelphia*, *Butler* wrote to *Collet*, and, by way of aſſiſting him to form a right judgment how to act, propoſed three plans as probable to be accompliſhed. *Firſt*, after his arrival in *France*, to get a freight to the *Iſle of France*, to go from thence to *Bombay*, and to employ the ſhip in the country commerce between *India* and *China*, until ſhe had gained ſufficient to make a complete inveſtment in *China* for *America*. *Secondly*, to go from *France* to *London*, and there get a freight for the company's ſettlements in *India*, and then to purſue the ſame courſe of trade, or to take a freight direct from *Bengal* for *America*, for *Hamburgh*, or other neutral ports. *Thirdly*, to gain a credit in *London*, and go out to *Bombay* or *Bengal*, with a complete inveſtment on their own account, to obtain a freight to *China*, remainder of her cargo, conſiſting of *Engliſh* and *Portugueſe* productions, and proceeds on her voyage to the *Britiſh* ſettlements in *India*, without any licenſe for the ſhip or the captain.—This is a legal voyage, and the inſurance on it valid; though the trade was not direct between *America* and *India*, and though as far as related to the *Britiſh* goods, this was a trading from *Great Britain* to *India*, without a licenſe, and though C. was ſtill a *Britiſh* ſubject.

Wilſon v. *Marryat*, 8 T.R. 31.

China, and at length to bring a cargo from thence, or *Bengal*, back to *America* or *France*: That *Collet* arrived with the ſhip at *Breſt*, and there ſold the flour, then proceeded to *Bourdeaux*, where he ſold the reſt of the cargo, and there purchaſed the goods mentioned in the ſecond policy, and loaded them on his own account on board the ſhip, which, with the cargo, were there in ſafety on the 1ſt of *May* 1796:—That whilſt the ſhip was at *Bourdeaux*, *Collet* came to *London*, and having obtained a credit with *Wilſon* (the plaintiff,) who, with his money, or upon his credit, purchaſed, on account of *Collet* and *Butler*, *Britiſh* goods, being the goods mentioned in the third policy; and which were ſhipped at *London*, on the account and riſk of *Collet* and *Butler*, on board three *American* ſhips, and conveyed to *Madeira*, for the purpoſe of being there put on board the *Argonaut*, and of being carried therein, together with the goods ſhipped at *Bourdeaux*, from *Madeira* to the *Britiſh* territories in the *Eaſt Indies*, and there traded with: That the *Argonaut* ſailed to *Madeira*, where ſhe took thoſe goods on board, together with ſome *Portugueſe* wines, *for the purpoſe of proceeding with her whole cargo to the* Britiſh *territories in the Eaſt Indies*, and of trading with them there; neither *Collet* or the ſhip being licenſed by the *Eaſt India* company to ſail or trade there: That the ſhip having ſailed from *Madeira* for the *Eaſt Indies*, was, with her cargo, on the 2d of *Auguſt* 1796, at *Symon's Bay*, near the *Cape of Good Hope*, ſeized and detained by the *Engliſh* Admiral, on ſuſpicion of being an illicit trader: That both *Butler* and *Collet* were natural born *Britiſh* ſubjects, and both become citizens of the *United States*, and domiciled there; the former before, the latter after, the declaration of independence: That on the 16th of *February* 1793, the uſual proclamation at the beginning of every war was publiſhed here, forbidding all mariners, &c. natural born ſubjects of this country, entering or continuing in the ſervice of foreign ſtates, or ſerving in any foreign veſſel, without the King's licenſe; and that *Collet* had not obtained any ſuch licenſe: That the plaintiff, who was a *Britiſh* ſubject,

ſubject, reſident at *London*, knew that the *Argonaut* was deſtined for the *Britiſh* territories in the *Eaſt Indies*, and that the goods were intended to be carried thither for the purpoſes of trade therein."—Upon this caſe, it was objected, on the part of the defendant, 1. That, under the 13th article of the treaty, the *circuitous commerce*, which was the ſubject of the inſurances, was not permiſſible, that article only allowing of a *direct intercourſe* between the *United States* and the *Britiſh* ſettlements in *India*; which was plainly indicated by the word *between*. 2. That, by the 14th article, the trade between *America* and the King's dominions in *Europe*, is to be ſubject to the laws of the reſpective countries; and by the prior exiſting laws of *Great Britain*, all perſons, as well foreigners as natives, excepting the *Eaſt India* company, are prohibited from trading from *Great Britain* to the *Eaſt Indies*; and that as the *Argonaut* was to take in goods at *Madeira*, ſent from *Great Britain*, to be carried to the *Britiſh* ſettlements in *India*, this was, in effect, a trading from *Great Britain* to the *Eaſt Indies*, to which the *American* treaty only afforded a fraudulent colour. 3. That, admitting ſuch a circuitous voyage from *America* to *India*, by the way of *Europe*, to be warranted by the treaty, ſtill this voyage, undertaken with that view, being commenced before the ratifications of the treaty were exchanged, (*a*) was illegal; and no part of an illegal voyage can be inſured: But, if it ſhould be conſidered only as a voyage from *Bourdeaux*, and ſo commencing after the ratification of the treaty, then it would not be within the 13th article, as not being a trading between *America* and the *Eaſt Indies*, in any ſenſe. 4. That, as *Collet* was born under the King's allegiance, and not being a citizen of the *United States* at the time of the declaration of their independence, he could only be conſidered as a *Britiſh* ſubject; and as ſuch, incapacitated by the navigation act, ſtat. 12 *G.* II. c. 18, from being maſter of

(*a*) This, by the 28th article, was the period of its commencement.

of an *American* veſſel, and prohibited by the acts for regulating the trade to the *Eaſt Indies* from trading thither, except under the orders, or by the licenſe of the *Eaſt India* company.—But the court, upon great conſideration, overruled all theſe objections, and determined that the plaintiff was entitled to recover.—Lord *Kenyon*, in delivering their opinion, ſaid,—"Three objections have been raiſed on the part of the defendant. I will diſpoſe of that firſt which was laſt in argument, namely, That *Collet*, the captain and part-owner of the ſhip, was an *Engliſhman* by birth, and was not, therefore, a citizen of *America*, within the meaning of the treaty between this country and *America*. On a former day we intimated our opinion that there was not much weight in this objection; and after conſideration, we are clearly of opinion that there is none.—*Collet* is a citizen of this country by birth, ſo that he cannot throw off his allegiance to it; He is alſo a citizen of *America*, for the purpoſes of commerce, having been adopted as a citizen of that country, and his being a natural born ſubject here, cannot deprive him of the advantages of being a citizen of that country. The next objection ariſes on the conſtruction of the 18th article of the treaty. (*a*) It was contended, that on the true meaning of that article, the intercourſe between *America* and the *Eaſt Indies* muſt be immediate and direct: But, on the fulleſt conſideration that we can give this caſe, comparing this with the other articles of the treaty, we are alſo of opinion that this objection is unfounded. That the party inſured might have come from *America* to other countries in *Europe*, might have bought goods, carried them back to *America*, and from thence to the *Eaſt Indies*, ſeemed to be admitted. Then, in point of reaſon, why may not that which may be done indirectly, be done directly, (*b*) and on the fair conſtruction of the words of

A natural born ſubject of *Great Britain* may become a citizen of the *United States* of *America* for the purpoſes of commerce, and ſhall be entitled to all the advantages of an *American* under this treaty; and his coming to this country for a temporary purpoſe does not deprive him of thoſe advantages.

(*a*) This objection was the firſt made.—(*b*) Perhaps, in anſwer to this queſtion, it might be ſuppoſed that the *Britiſh* government, knowing the diſadvantage with which the Americans muſt carry European commodities directly from *America* to *India*,

of this article, we think that this objection cannot prevail. The remaining objection is, that the voyage inſured was a part of a voyage, the whole of which, ſuppoſing it to be one integral voyage, was not legal in its inception; and that, if there be any infirmity in any part of an integral voyage, the whole, for this purpoſe, becomes illegal. (*a*) But this argument is too refined, as applied to this caſe. Before the commencement of this voyage, there was a rumour, that a treaty between the two countries was in agitation, and this perſon came to *England*, probably with a view of carrying on the voyage to the *Eaſt Indies* under the treaty. However, in deciding this caſe, we muſt look to the facts diſcloſed in the ſpecial verdict. Now it is not there ſtated, that the continuation of the voyage to the *Britiſh* ſettlements in the *Eaſt Indies*, was the voyage that was at all events to be performed, when the voyage began in *America*. For though different plans had been ſuggeſted by *Butler*, in his letter, for the continuation of the voyage, it is only found by the ſpecial verdict, that *Collet*, when he ſailed from *America*, intended to go to the *Eaſt Indies*, but without ſaying to that part which belongs to *Great Britain*. As far as reſpected the *Americans*, every other part was *mare liberum*; and though before the treaty, the inſured could not have gone to any of our ports in the *Eaſt Indies*, without being guilty of an infraction of our law, he might have gone to any other port in the *Eaſt Indies*. Every thing, therefore, in the verdict relating to theſe different plans, though a fair ſubject of inveſtigation and diſcuſſion, may now be laid out of our conſideration; it not being found, in any part of the ſpecial verdict, what preciſe voyage the parties had in contemplation

If an *integral* voyage be, in any reſpect, illegal in its commencement, no inſurance can be legally effected on any part of it, though ſuch part, taken by itſelf, would be legal.

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dia, meant that the trade between them and the *Britiſh* ſettlements in *India* ſhould be *immediate and direct*, leſt the Americans, by taking *Europe* in their way to *India*, might too eaſily rival the company in the *Indian* markets.—(*a*) This was the third objection made on the part of the defendant.

plation at the inception of the voyage from *America*. Then if the voyage inſured be not infected by what was done in *America*, it was a legal voyage. The ſhip originally ſailed from *Philadelphia* to *Breſt*, and then to *Bourdeaux*, which ſhe might legally do; and, before ſhe left the latter place, the treaty between this country and *America* was ratified. It then appears, that in *May* 1796, ſhe ſailed to *Madeira*, where ſhe took in other goods, "for "the purpoſe of proceeding with the whole cargo to the "*Britiſh* territories in the *Eaſt Indies*," which *then* ſhe might well do, under the treaty which had before that time been ratified. Then it does not appear that *Collet* had any intention of going to any of our ſettlements in the *Eaſt Indies*, until after the ratification of the treaty; and, though I admit, that if there had been any infirmity in any part of the integral voyage, it would have made the whole illegal, ſo that the inſured could not recover upon a policy on any part of it; yet it not appearing that in fact, there was any illegality in any part of this voyage, we are of opinion that this objection alſo fails."—This judgment was afterwards affirmed upon a writ of error in the *Exchequer chamber*, on which occaſion the opinion of the court was delivered by Lord C. J. *Eyre* on all the points of the caſe, in a very able and elaborate judgment. (*a*)

CHAP.

(*a*) 1 *Boſ.* & *Pul.* 430.

CHAP. VI.

Of the Riſks or Perils againſt which marine inſurances may be made.

THE *perils of the ſea*, taken in the largeſt ſenſe, comprehend all thoſe accidents and misfortunes to which ſhips and goods at ſea are expoſed, from cauſes which no human prudence in the inſured can prevent or control; *quod fato contingit, et cuivis, quamvis diligentiſſimo, poſſit contingere.*

Though theſe perils are all incident to ſea voyages, yet we diſtinguiſh thoſe which ariſe from waves and tempeſts, rocks and ſands, and which are, ſtrictly ſpeaking, the *perils of the ſea*, from ſuch as proceed from cauſes which may exiſt when the winds and waves are all propitious; ſuch as enemies, fire, the unſkilfulneſs or wilful miſconduct of the maſter or mariners, &c.

It is not propoſed, in the preſent chapter, to ſhew the nature and properties of each particular ſpecies of riſk, nor to which of them a loſs ſhall be referable, becauſe this will more properly occur when we come to treat of the loſſes themſelves. For the preſent we will confine ourſelves to ſhew,

1. Againſt what riſks an inſurance may be legally made;
2. What riſks are within the common policies;
3. What are excluded by the uſual memorandum;
4. To what riſks the owners and maſter of the ſhip are liable;
5. What ſhall be the commencement, continuance, and end of the riſk;
6. Whether the riſk may be changed.

Sect. 1.

Againſt what Riſks marine inſurances may be legally made.

INSURANCES may be made againſt all the riſks or perils, which are incident to ſea voyages, ſubject, however,

Inſurances may be made againſt all marine riſks.

Subject to certain exceptions.

ever, to certain exceptions, founded in public policy, and the intereſts of humanity, which require that in certain caſes, men ſhall not be permitted to protect themſelves againſt ſome particular perils by inſurance.

But an inſurer cannot make himſelf anſwerable for a loſs proceeding from the fault of the inſured.

Upon principles of natural juſtice, the inſurer can, in no caſe, make himſelf anſwerable for any loſs or damage *proceeding directly from the fault of the inſured*; becauſe no man can bind himſelf to me to be anſwerable for my faults. (*a*)

No inſurance can be made, even againſt the perils of the ſea, upon illegal commerce.

In the third chapter of this book, which treats of the ſubject matter of marine inſurances, we have already ſhewn that inſurances upon any traffic intended to be carried on contrary to the laws of this kingdom, or thoſe of its dependencies, or the law of nations, are void; and that the adventurer in ſuch traffic cannot be protected by inſurance, even againſt the ordinary perils of the ſea, much leſs againſt thoſe of ſeizure and confiſcation, which are always attendant upon ſuch illicit commerce, when detected.

The inſurance of the lives of men prohibited in *France*.

In moſt foreign countries, inſurances on the lives of men are prohibited.—In *France* they have always been deemed illegal, (*b*) and are expreſsly forbidden by the ordinance of *Louis* XIV. (*c*); becauſe, ſay the *French* writers, it is an offence againſt public decency, to ſet a price upon the life of man, particularly the life of a freeman, which is above all valuation. (*d*) 'But theſe reaſons,' ſays *Pothier*, (*e*) 'do not apply to *ſlaves*.—*Negroes*, 'being an article of commerce, and capable of valuation, 'there is no reaſon why the lives of ſuch perſons ſhould 'not be the ſubject of inſurance.'

But the *French* writers hold that this does not apply to negro ſlaves.

This doctrine is evidently contrary to the expreſs proviſions of the 10th article of the ordinance above cited. It is curious, however, to obſerve by what ſort of reaſoning *Valin* attempts to vindicate it.—'It being permit-'ted,' ſays he, 'by the 11th article of the ſame ordinance, to inſure

(*a*) Vid. *Pothier*, h. t. n. 65.—(*b*) Le *Guidon*, ch. 16, art. 5.—(*c*) Tit. des aſſurances, art. 10.—(*d*) *Valin*, h. t. art. 10, p. 54, *Pothier*, h. t. n. 27.—(*e*) Ubi ſup.

'insure the persons of captives redeemed out of slavery, 'to the amount of their ransom against re-capture, or any 'death except natural death; upon their return to their 'native country, it has become a practice, by the ap- 'plication of this article to a *similar case*, to insure *negro* '*captives*, *bought* on the coast of *Guinea*, who are gene- 'rally valued in the policy at so much per head; and in 'such case, the insurer becomes liable for their loss by 'the perils of the sea, or by death; but the case of *natural* '*death* is always excepted, conformably to the last men- 'tioned article. By *natural death* is understood, not only 'that which arises from sickness, and common diseases, 'but that also which the slaves themselves often seek in 'the moment of despair; because these are accidents hap- 'pening *in the course of nature*, or occasioned by the *inherent* '*vice of the article*, or sometimes by the fault of the mas- 'ter, which, therefore, ought not to fall on the insurers. 'But it is otherwise, when they are killed or thrown 'overboard in a revolt; for then, by the *French* law, the 'insurer is liable. (*a*)

So that, according to this learned author, the disposition to suicide is natural, in negro slaves, and imputable to the *inherent vice of the article*, and their death proceeding from this cause must be deemed natural death. But the killing them, or throwing them overboard in a revolt, is a loss incident to this trade, and a peril within the policy.

In *England*, slaves were formerly insured against all risks.

It is to be lamented, that with us also, the unfortunate objects of this cruel traffic have been too much considered as mere merchandize; and the insured upon this trade formerly recovered, under the common policy, for any loss sustained in the voyage by the mortality of the slaves, whether they were thrown overboard, in cases of supposed necessity, or died a natural death, or perished by the perils of the sea. *British* humanity has long bewailed the sufferings of these unhappy victims. The legislature, touched

(*a*) *Valin*, h. t. art. 11. p. 55.

touched by this ſenſation, has interpoſed, and by an annual act, which is made with a view to *intereſt* the perſons concerned in this trade in the preſervation of the lives and health of the ſlaves, declares, that though the policies on the ſhips and goods in this trade ſhall remain in the uſual form, yet that, 'Under ſuch policies, 'no loſs or damage ſhall be recoverable on account of the 'mortality of ſlaves by natural death or ill treatment, or by 'throwing them overboard on any account whatſoever, (*a*) 'or by loſs or damage by reſtraints or detainments of 'kings, princes, people, or inhabitants of *Africa*, where 'it ſhall be made appear that ſuch loſs or damage was 'occaſioned through any aggreſſion, for the purpoſe of 'procuring ſlaves, and committed by the maſter of ſuch 'ſhip, or by any perſon commanding any boat, or party 'of men, belonging to ſuch ſhip, or by any perſon 'acting by the direction of any ſuch maſter or commander 'reſpectively.' (*b*)

But now, by ſtatute, though the policy remains in the ſame form as before, it cannot protect the inſured againſt loſſes occaſioned by natural death, ill treatment, throwing overboard, or by reſtraint of princes occaſioned by attempts to get ſlaves by force.

Upon the conſtruction of theſe ſtatutes, it has been determined, that if, by unavoidable accidents, the voyage be prolonged beyond the uſual time, whereby a ſcarcity of proviſions enſues, and a number of ſlaves periſh for want of proper food; they ſhall be conſidered as having died a natural death; though the *original cauſe* of this misfortune may be ſaid to have ariſen from the perils of the ſea.

Thus:—An inſurance was made on a ſhip and goods, "At and from *Liverpool* to the coaſt of *Africa*, "during her ſtay and trade there, and from thence to "her port and ports of diſcharge, ſale, and final deſti-"nation in the *Weſt Indies* and *America*, &c."—In the voyage from *Africa* to the *Weſt Indies*, the cargo conſiſted chiefly of ſlaves.—In an action on the policy, the plaintiff declared, "That the ſhip, with her cargo, after her departure from the coaſt of *Africa*, upon the voyage inſured,

As where an *African* ſlave ſhip, on her paſſage to the *Weſt Indies*, was ſo retarded by bad weather and other unavoidable accidents, that, from the extraordinary length of the voyage, the proviſions for the ſlaves were exhauſted, and many of them died from the want of proper food. Though the failure of the

(*a*) Vid. *Greſſon* v. *Gilbert*, *Park*, 62. inf. c. 16. § 2.—(*b*) Vid. Stat. 30 *G.* III. c. 33, § 8. 34 *G.* III. c. 80. § 10, and 39 *G.* III. c. 80. § 24.

ſured, and before her arrival at any of her ports of deſtination, was, by tempeſtuous weather, and through the mere perils and dangers of the ſea, greatly retarded and delayed in her voyage; by reaſon whereof, and from a failure and want of proper and ſufficient food and ſuſtenance for the ſlaves, occaſioned by the ſhip being ſo delayed, divers of the ſaid ſlaves became diſtempered and died; and that afterwards the ſhip was loſt with the reſidue of the ſlaves and the reſt of the cargo."—Upon the trial of this cauſe, it appeared in evidence, that the voyage was from the river *Cameroon*, on the coaſt of *Africa*, to *Grenada*; that while the ſhip was at *Bilbay*, on the coaſt, there was a ground ſwell, by reaſon of which ſhe ſtruck ſeveral times, and was nearly wrecked; that from thenceforth ſhe became leaky, her rudder was rendered almoſt uſeleſs, and the veſſel unmanageable; that the cargo of ſlaves was reduced in the courſe of the voyage from 168 to 40, by hardſhips occaſioned by the delay of the voyage; by reaſon of which the ſlaves were obliged to be fed on *Indian* corn, which was an improper food for them; that all poſſible care had been taken to furniſh the ſhip, as well with *European* proviſions, as with ſuch as the coaſt furniſhed, for the uſe of the ſlaves; but that, inſtead of the ordinary voyage, which is from ſix to nine weeks, they did not arrive at *Barbadoes* till after a voyage of ſix months and eight days; and that the captain put into *Barbadoes*, inſtead of *Grenada*, which would have been a ſail of thirty-ſix hours longer, by the advice of the officers and crew, for the preſervation of the ſurviving ſlaves.—Mr. Juſtice *Heath*, before whom this cauſe was tried at *Lancaſter*, was of opinion, that the plaintiff was barred by the ſtatutes 30 *G.* III. c. 33. § 8. and 34 *G.* III. c. 80. § 10. (*a*) from recovering the value of the ſlaves, they having died natural deaths; but he reſerved that point for the conſideration of the court.—Upon the queſtion being moved in the court of King's Bench, it was urged on the part of

proviſions was occaſioned by the perils of the ſea, and the death of the ſlaves was a conſequence of this; yet the ſlaves ſhall be conſidered as having died a natural death within the meaning of the 30 *G.* III. c. 33. § 8. and 34 *G.* III. c. 80. § 10.

Tatham v. *Hodgſon*, 6 T. R. 656.

(*a*) Sup. 133, 134.

of the plaintiff, that the misfortune had been occaſioned by the extraordinary and incalculable duration of the voyage, ariſing from the perils of the ſea; in conſequence of which the ſlaves had been actually *ſtarved* to death, which could in no ſenſe be conſidered as a *natural* death; nor would the plaintiff's recovery contravene the humane intention of the legiſlature, which was directed againſt inſurances to protect the owners from loſſes ariſing from their own negligence and miſconduct.—But the court concurred in opinion with Mr. Juſtice *Heath*, and determined that the above ſtatutes precluded the plaintiff in this caſe from recovering for the loſs of the ſlaves.—Lord *Kenyon* ſaid,—"No fair doubt can be raiſed on the words of the act. It prohibits the owners from recovering upon any inſurance, on account of the mortality of ſlaves by natural death. It meant that every perſon going on this voyage, ſhould find his intereſt combined with his duty to take all poſſible care that the ſlaves ſhould be well fed. A captain, who knows the poſſible length of the voyage, does not diſcharge his duty, if he does not take a ſufficient quantity of proviſions."—Mr. Juſtice *Lawrence* ſaid,—"I do not know that it was ever decided, that a loſs ariſing from the miſtake of the captain, was to be deemed a loſs by the perils of the ſeas. In the caſe of *Gregſon* v. *Gilbert*, (*a*) where the captain miſtook *Jamaica* for *St. Domingo*, it was decided not to be a loſs by the perils of the ſea. In this caſe, it is impoſſible to decide that the plaintiff can recover, without ſaying that the ſlaves did not die natural deaths. If they had died of fevers or other illneſs occaſioned by the length of the voyage, the plaintiff certainly could not have recovered. Now the length of the voyage, occaſioned the want of proviſions, and that occaſioned the illneſs of which they died: But that is a natural death within the meaning of the act of parliament."

What

(*a*) Inf. c. 16. § 2.

Sect. 2.

What Riſks or Perils are within the common Policies.

THE words of an *Engliſh* policy, which ſpecify the various riſks againſt which inſurances are uſually made, are theſe:—'Touching the adventures and perils which 'we the aſſurers are contented to bear, and do take upon 'us in this voyage, they are of the ſeas, men of war, 'fire, enemies, pirates, rovers, thieves, jettiſons, letters 'of mart and counter-mart, ſurpriſals, takings at ſea, 'arreſts, reſtraints and detainments of all kings, princes, 'and people, of what nation, condition, or quality ſo-'ever; barratry of the maſter and mariners; and of all 'other perils, loſſes, and misfortunes, that have or ſhall 'come to the hurt, detriment, or damage of the ſaid 'goods and merchandizes, and ſhip, &c. or any part 'thereof, without prejudice to this inſurance.' The words of the policy which ſpecify the riſks.

Some foreign authors think that, under words nearly ſimilar, the inſurer is not liable for loſſes ariſing from unuſual or extraordinary accidents. (*a*) But the ſweeping words, in the latter part of the above clauſe, ſeem to preclude all doubt on this ſubject, in our *Engliſh* policies. They ſeem to be ſufficiently comprehenſive to embrace every ſpecies of riſk to which ſhips and goods are expoſed from the perils of ſea voyages.

Molloy, (*b*) indeed, ſays, 'Almoſt all thoſe curious 'queſtions that former ages and the civilians, according 'to the marine law, nay, and the common lawyers too, 'have controverted, are now out of debate. Scarce any 'misfortune that can happen, or proviſion to be made, 'but the ſame is provided for in the policies that are now 'uſed; for they inſure againſt heaven and earth, ſtreſs of 'weather, ſtorms, enemies, pirates, rovers, &c. or what-'ever

(*a*) *Roccus* not. 63, *Santerna*, part. 3, n. 72, *Pothier, des obligations*, n. 668.—(*b*) B. 2, ch. 7, § 7.

'ever detriment ſhall happen or come to the thing in-'ſured.' (*a*)

In all the *French* policies they add the words, '*connus ou* '*inconnus*,' or others of the like import; and the inſurer, by expreſs words, puts himſelf in the place of the inſured. (*b*)

Sect. 3.

What Riſks are excluded by the common Memorandum.

BUT, by the agreement of the parties, the general words of the policy may be altered or qualified, and any of the riſks may be wholly or in part excluded, and the inſurance may be made only againſt ſome particular riſks, or up to, or beyond, certain degrees, or upon particular articles.

In all policies it is ſtipulated that the inſurer ſhall not be liable for any partial loſs, on certain articles, nor above certain rates on others.

In order to confine inſurances to that which ought to be their only object, namely, an indemnity againſt real and important loſſes, ariſing from the perils of the ſea; and to obviate diſputes reſpecting loſſes ariſing from the periſhable quality of the goods inſured, and all trivial ſubjects of difference and litigation, it ſeems to be the general law of all maritime ſtates, and it is expreſsly provided by the ordinance of *Louis* XIV. that the inſurer ſhall not be liable for any average loſs, unleſs it exceed *one per cent.* (*c*) Beſide this, a clauſe has been introduced into the policies of moſt countries, by which it is ſtipulated that the inſurer ſhall not be liable for any partial loſs under a given rate *per cent.* In *England*, it is now conſtantly ſtipulated in all policies, that upon certain

(*a*) Sub nomine periculi, de quo fit cautio comprehenditur omnis caſus qui accidit in mari, a tempeſtate, ab hoſtibus, prædonibus, repriſaliis, ut vocant arreſtis aliiſque modis uſitatis et inuſitatis citra fraudem et culpam contrahentium, aut domini mercium vel navis. *Grot.* de jur. Hol. part 24.—(*b*) Vid. *Emerig.* vol. 1. p. 361.—(*c*) Vid. *Valin*, on art. 47. h. t. p. 113.

certain enumerated articles of a quality peculiarly perishable, the insurer shall not be answerable for any partial loss whatever; that, upon certain others, liable to partial injuries, but less difficult to be preserved at sea, he shall only be liable for partial losses above *five per cent.*; and that, as to all other goods, and also the ship and freight, he shall only be liable for partial losses above *three per cent.*

This stipulation is made by a memorandum in the form of a warranty, inserted at the bottom of all *English* policies. It was first introduced here about the year 1749; before which time the insurer was liable for every injury, however small, that happened to the thing insured. It was therefore thought better, by such a stipulation, to free him from small partial losses, than to compensate him for the extraordinary risk, by adapting the premium to the nature of the commodity. This must, in such cases, either have rendered the calculation of the premium a matter of much nicety, or else have made the policy too complicated; a mode of insurance which was the less likely to be adopted here, as the *Dutch* had before tried it, and were afterwards obliged to abandon it. (*a*)

This clause was first introduced in 1749, to save the necessity of adapting the premium to the nature of the commodity.

But though all our different policies thus provide against trivial demands on account of small partial losses, yet they all indemnify the insured against every loss, however inconsiderable, arising from any cause affecting the general safety of the ship and cargo. Losses of this sort, being of the nature of *general average*, are so called in the memorandum; and there is, therefore, annexed to each of the provisions above mentioned, an exception of general average. In the policies of private insurers, the case of the *stranding of the ship* is likewise excepted.

But the insurer is liable for losses, however small, called *general average*, and losses occasioned by the *stranding of the ship*.

In the common policies, used in *London* by private underwriters, the memorandum runs thus:

The form of this memorandum.

'N. B. Corn, (*b*) fish, salt, (*c*) fruit, flour and seed, 'are

In the policies of private underwriters.

(*a*) 3 *Bur.* 1551.—(*b*) The term *corn* comprehends every sort of grain, and also pease and beans. Vid. *Mason* v. *Skurray*, inf. 143.—(*c*) The term *salt* does not comprehend *salt petre*. Per *Wilson* J. at N. P. after East. 27 *G.* III. in *Journu* v. *Bourdieu*, *Park.* 112.

'are warranted free from average, unleſs general, or 'the ſhip be ſtranded:—Sugar, tobacco, hemp, flax, 'hides and ſkins, are warranted free from average, under '*five per cent.*; and all other goods, alſo the ſhip and 'freight, are warranted free from average, under *three* '*per cent.* unleſs general, or the ſhip be ſtranded.' (*a*)

But, it being determined, that any ſtranding lets in the inſured to claim his whole partial loſs, the two inſurance companies omitted the words "*or the "ſhip be ſtranded.*"

Canillon v. *Lond. Aſſur.* at N. P. in 1754, cited 3 *Bur.* 1553.

This form of the memorandum was generally uſed, not only by private underwriters, but alſo by the two inſurance companies, from its firſt introduction in 1749, till the year 1754, when a caſe occurred on a policy on *corn*, where the ſhip being *ſtranded*, the inſured recovered a partial loſs to the amount of about 80l. *per cent.*—Lord C. J. *Ryder*, and a ſpecial jury, conſidering the words, '*free from average, unleſs general, or the ſhip be ſtranded*,' as a *condition*, and holding that by the ſhip's being ſtranded, the inſured was let in to prove his whole partial loſs. (*b*)

In conſequence of this determination, the *London Aſſurance* company left out of the memorandum in their policies, the words '*or the ſhip be ſtranded*;' and the *Royal Exchange Aſſurance* ſoon after adopted the ſame alteration. Private underwriters, however, have continued the memorandum in the old form, probably with a view to encourage merchants to inſure with them, in preference to the two inſurance companies; and it muſt be owned, that caſes may occur where the difference may be of conſiderable conſequence to the inſured.

Be

(*a*) The only material difference between the memorandum of private underwriters, and thoſe of the two inſurance companies conſiſts in the omiſſion of the words '*or the ſhip be ſtranded*,' and that they inſert *rum* among the articles upon which they will not be liable to any partial loſs under five *per cent.*; and omit *freight* out of the articles upon which there ſhall be no partial loſs under three *per cent.*—Vid. the forms of the different policies in the ſchedule to the 35 *G.* III. c. 63. and in the Appendix, numbers 1 and 2.—(*b*) There is a note in 2 *Mag.* 385, in which this caſe is looſely mentioned, as affording a reaſon for ſtriking the words, "*or the ſhip be ſtranded*," out of all policies. But the caſe as cited by Sir *Fletcher Norton*, as above, is the only one to be relied on. Vid. 7 T. R. 222.

Be that, however, as it may, much doubt has arisen as to the true meaning of the words, '*free from average*, '*unless general, or the ship be stranded*;' and a different construction having been put on this clause by judges of the highest eminence, the best mode, perhaps, of shewing how it is now understood, will be to state the various decisions upon it, subsequent to the above case of *Cantillon* v. *Lond. Assurance*, in the order of time in which they occurred.

Many questions have arisen on the words, "*free from average, unless general, or the ship be stranded.*"

In the first of these, which was determined in the year 1764, the only point decided by the court was, that the underwriters were, by the memorandum, exempted from any responsibility for a partial loss, sustained by a cargo of corn in a storm; the ship not having been *stranded*, and this not being a *general average*.—But it will appear that Lord *Mansfield*, in delivering the opinion of the court, over-rules the decision of Sir *Dudley Ryder* in *Cantillon* v. *London Assurance*, and founds his judgment on the ground, that the above words do not make a *condition*, but only an *exception*; and that the insurer is liable only for partial losses upon corn, &c. *arising* from the ship's being *stranded*, or of the nature of a *general average*; but to no other partial losses.

The word *unless* has been held to make an *exception*, not a *condition*.

The case alluded to, was an insurance on a cargo of wheat, "At and from *Lancaster* to *Rotterdam*."—The policy was in the ordinary form, and contained this clause;—"*Corn and fish are warranted free from average*, "*unless general, or the ship be stranded.*"—It appeared that the ship, in her voyage, met with a violent storm, by which she was obliged to part from her cable and anchor, *for the safety of the ship and cargo*, was greatly damaged, and obliged to run for the first port, being *Liverpool*, to refit, and where she incurred a considerable expense in refitting. That the hatches were not opened while the ship remained at *Liverpool*. That the ship being refitted, she proceeded on her voyage, and arrived at *Rotterdam*, where the wheat was landed, and appeared to have received damage by the storm, to the amount of 56l. 19s. 8d. '*per cent.*—The question was, upon the above clause, whether this could be recovered against the insurer.—For the plaintiff, it was contended, that the words of the memorandum amounted

A ship, with a cargo of corn, having met with a storm, was obliged to run for the nearest port to refit, where she incurred a considerable 'expense in repairs. On her arrival at her port of destination it was found that the corn was greatly damaged.—This loss, not being of the nature of a *general average*, nor arising from the ship's being *stranded*, cannot be recovered on the policy; for the words of the memorandum do not

make a *condition*, but only an *exception*.

Wilſon v. *Smith*, 3 *Bur.* 1550.

amounted to a *condition* to be free from average, unleſs, in the caſe of a *general average*, or the ſtranding of the ſhip: But, if *either* of theſe events ſhould happen, this warranty was diſcharged; and as an authority for this, the cauſe of *Cantillon* v. *London Aſſurance*, (*a*) was relied on.—On the other ſide, it was inſiſted, that theſe words only made an *exception*, to be free from average in all other caſes, but theſe two; and as neither of them had happened, in this inſtance, the inſured had no claim on the inſurer.—The court were of this opinion, and gave judgment for the defendant.—Lord *Mansfield*, in delivering the opinion of the court, ſaid, "that an ambiguity aroſe in the policy, from its uſing the words *average* in different ſenſes; it being uſed to ſignify *a contribution to a general loſs*, and alſo a *particular partial loſs*; that, whether taken in the one ſenſe or the other, it would not avail the plaintiffs; for if it ſignified *contribution*, the inſurer was to be free from contributing, unleſs the contribution were *general*; if it ſignified *loſs*, then plainly the warranty was, that the inſurer ſhould be free from all *particular* loſſes. That the inſurer was liable for all loſſes *ariſing* from a ſtranding of the ſhip, and where there was a *general* average; but that all other *partial* loſſes were excluded by the terms of the policy. That the word *unleſs* meant the ſame as *except*; and was not to be conſtrued as a *condition*, in the ſenſe contended for; (*b*) and that the words 'free from average, *unleſs general*,' could never mean to leave the inſurer liable to any *particular* average."

The next was a *niſi prius* caſe, before Lord *Mansfield*, in 1780, in which it was proved to be the uſage of trade, that where the ſpecific thing mentioned in the memorandum came to the port of delivery, the memorandum warranted the inſurer to be free from any demands in reſpect of any damage it might have ſuſtained, though amounting to a total loſs; and Lord *Mansfield* told the jury,

(*a*) Sup. 140.—(*b*) Lord *Kenyon* in his judgment on the caſe of *Burnett* v. *Kenſington*, inf. conſiders this as an *obiter dictum*, which does not bring conviction to his mind.

jury, that this uſage muſt be conſidered as forming a part of the contract.

That was an inſurance made on a cargo of *peaſe*, (*a*) "from *London* to *St. Auguſtine*:"—The peaſe arrived at the port of deſtination, but ſo much damaged in the voyage, that they produced but about one fourth of the amount of the *freight*; which, as the ſhip arrived at her port of diſcharge, became due.—The inſured brought an action to recover as for a total loſs.—The defence was, that, if the goods mentioned in the memorandum arrived *at the market*, though a loſs equivalent to a total loſs had happened, the inſurer is not liable.—Four or five witneſſes, converſant in ſettling loſſes upon policies, proved that the uſage was, in ſuch caſes, to hold the underwriter diſcharged.—Lord *Mansfield*, in his addreſs to the jury, ſaid,—'This is a queſtion of conſequence, and turns upon the general import of the exception. The witneſſes examined have put it on that point, and they hold, that if the ſpecific thing come to the port of delivery, the underwriter cannot be called upon. Before the year 1749, (*b*) when the policy was general, and operated as an indemnity, there was little difference between a total and a partial loſs.'—He then ſtated the caſe of *Boyfield* v. *Brown*, (*c*) which, he obſerved, was prior to the memorandum in queſtion. He then ſaid,—'But the caſes now ſtand upon that memorandum, which is in very general words: The queſtion is, whether the uſage has not explained the generality of the words. If it has, every man, who contracts under an uſage, does it as if the point of uſage were inſerted in the contract *in terms*. The witneſſes all ſwear it to have been underſtood, that if the ſpecific thing come to the market, the memorandum warrants the inſurer to be free from any demand as for a partial loſs.'—The jury found for the defendant.

A cargo of *corn* arrives at the port of delivery ſo damaged in the voyage as to be worth leſs than the freight:—Yet the ſhip not having been *ſtranded*, and there being no *general average*, the inſurer is not liable.

Maſon v. *Skurray*, at N. P. after *Hil.* 1780. *Park* 116.

Though the caſe of *Boyfield* v. *Brown*, was ſeveral years before, and this long after, the introduction

(*a*) *Peaſe*, in a former action on the ſame policy, had been holden to be *corn*, within the meaning of the memorandum.—(*b*) Vid. Sup. 139.—(*c*) 2 Str. 1065, inf. c. 13. § 2.

tion of the memorandum into policies of inſurance, it is very difficult to reconcile them. Lord *Mansfield* ſeems inclined to *diſtinguiſh* them, by obſerving, that before the year 1749, when the policy was general, there was little difference between a total and a partial loſs; but that, ſince then, the caſes ſtood on the memorandum.—It is true, that where there is but little difference between a total and a partial loſs, it is of little importance how the queſtion is decided: But Lord *Hardwicke* was too good a lawyer not to be aware of the conſequences likely to reſult from the precedent; and indeed it appears, that, in the caſe of *Boyfield* v. *Brown*, he founded his judgment on the uſage of trade, as it was in evidence; namely, that where the ſalvage exceeds the freight, the freight is deducted from the ſalvage, and the difference is the loſs. From this his Lordſhip very juſtly infers, that where the ſalvage falls ſhort of the freight, the plaintiff is entitled to have it conſidered as a total loſs.

The following caſe, which came before the court ſome years after the above caſe of *Maſon* v. *Skurray*, was decided upon the ſame principle, or rather carried the principle farther.

If the articles for which the inſurer is warranted to be free of average, except general, *ſpecifically remain* after the voyage, though by ſea damage, they are rendered of no value, yet if the ſhip has not been ſtranded, this is only a *partial loſs*, for which the inſurer is not liable.

An inſurance was made "on ſhip and goods, at and "from *Newfoundland* to her port of diſcharge in *Portu*-"*gal*."—It contained the uſual memorandum, that corn, fiſh, &c. were warranted free from average unleſs general, or the ſhip be ſtranded.—The defendant paid into court 16l. 19s. 6d., viz. 8l. 15s. *per cent.* as *general* average on the cargo, and 8l. 4s. 6d. as a *particular* average on the ſhip.—There was a verdict for the plaintiff for 51l. 15s. ſubject to the opinion of the court, on a caſe which ſtated,—That the ſhip ſailed on the voyage inſured on the 2d of *December* 1783, with a cargo of fiſh; that on the 11th, 40 quintals were hove overboard, for the preſervation of the ſhip and cargo; that on the 20th, 26 quintals more were thrown overboard, for the ſame purpoſe; that the ſhip had very bad weather till the 10th of *January*, when ſhe was obliged to put into *Liſbon*, though bound to *Figara*; that at *Liſbon* ſhe was ſurveyed by the board of health, at the deſire of the captain,

Cocking v. *Fraſer* B. R. Eaſt. 25 G. III. MS. There is a note of this caſe in *Park* 114.

tain, who was the conſignee; and it appeared to them that the cargo, through ſea damage, was rendered *of no value*; that the ſhip, therefore, did not proceed to *Figara*. —Upon this caſe, the court were of opinion, that the underwriter was anſwerable for no more than he had paid into court on account of general average on the cargo, and particular average on the ſhip.—Lord *Mansfield* ſaid, —"The clauſe relative to fruit and fiſh is now a very old one in policies of inſurance. The inſurer undertakes for all loſſes upon theſe articles, except particular damage, within a certain amount, unleſs the ſhip be ſtranded; he therefore engages againſt a total loſs. Now a total loſs of the thing inſured, is *the abſolute deſtruction of it, by the wreck of the ſhip*. The fiſh may all come to port, though, from the nature of the commodity, it may be damaged, it may be ſtinking: Still as the commodity *ſpecifically* remains, the underwriter is diſcharged."(*a*)—Mr. Juſtice *Buller* ſaid,—"That from the firſt introduction of the clauſe in 1749, to the preſent time, the underwriter has never been held anſwerable, but where there has been a *total loſs* of the articles mentioned in it."

The inſurer has never been held liable, but for a total loſs upon the enumerated articles.

In the next caſe which occurred on this ſubject, Lord *Kenyon*, at *niſi prius*, held that where the ſhip has been *ſtranded*, the articles mentioned in the memorandum are put in the ſame ſituation as any other commodity; and that the inſurers become liable for all damage which they may ſuſtain though not *ariſing* from the ſtranding.

If the ſhip be ſtranded, the inſured may recover for any partial loſs, tho' it do not *ariſe* from the ſtranding.

There, an inſurance was made on *fiſh* on board the ſhip *Nymph*, "from *Chaleur Bay* to her port or ports of diſ-"charge, in *England*, *Ireland*, *Portugal*, *Spain*, *or Italy*."—The

The memorandum controls the general words of the policy, as far it extends. But, upon a ſtranding taking place, the articles mentioned in the memorandum are put in the ſame ſituation as any other commodity; & the inſurers become liable for all damage ſuſtained by them though not ariſ-

(*a*) If a cargo of corn become *entirely rotten*, the inſured cannot abandon; this being only a ſimple average which would not excuſe the inſured from paying the ſtipulated freight. *Pothier*, *Contrats maritimes*, n. 59. The reaſon is, that though the corn be damaged or ſpoiled, it ſtill exiſts. The damage does not operate an entire loſs, and the owner is not deprived of it. Vid. *Emerig.* vol. 2. p. 184. But ſee the obſervations of Lord *Kenyon* on this judgment of Lord *Mansfield*, in *Burnett* v. *Kenſington*, inf. 151.

ing from the ſtranding.

Bowring v. *Elmſlie*, at N. P. after Tr. 1790, cited 7 T. R. 216.

The policy contained the uſual memorandum.—An action was brought on the policy to recover a partial loſs ſuſtained by the fiſh, the ſhip having been, as the declaration ſtated, *ſtranded*; that is, ſhe was in ſuch a leaky condition, that the captain and crew thought it neceſſary to run her on ſhore off *Malaga*, for their own preſervation, thinking it would be impoſſible to get her into port.—On the part of the defendant, there was evidence to ſhew that there was no neceſſity for running the ſhip on ſhore, but that it had been done with a fraudulent intention; and it was contended, that even ſuppoſing the ſhip to have been unavoidably ſtranded, the greateſt part of the damage ſuſtained by the fiſh was occaſioned by its having been too long on board, and not by any defect in the ſhip, or her being ſtranded.—Lord *Kenyon*, after ſtating the evidence to the jury, told them, that if they ſhould think that the captain and crew acted *bonâ fide*, and that the ſhip was run on ſhore from neceſſity, a further queſtion would ariſe upon the conſtruction of the memorandum, which, like the policy itſelf, muſt be interpreted by the uſage of merchants. It being then ſignified to his Lordſhip, by the merchants in court, that there was no uſage upon the ſubject, and that the queſtion, never having before occurred, was then for his deciſion; he proceeded to obſerve, that the general mode of conſtruing deeds, to which there are exceptions, was, to let the exception control the inſtrument as far as the words of it extend, and no farther; and then, upon the caſe being taken out of the letter of the exception, the deed operates in full force. That, agreeably to this rule, it ſeemed to him that the ſtranding of the ſhip put fiſh in the ſame ſituation as any other commodity not mentioned in the memorandum; and the underwriters were liable for all damage ſuſtained by it; for otherwiſe there would be very conſiderable difficulty in aſcertaining how much of the loſs aroſe from the perils inſured againſt, and how much by the periſhable nature of the commodity, which was the very thing the memorandum was intended to prevent.—A verdict was given for the defendant,

ant, on the ground that the ſhip had been run on ſhore fraudulently.

The above opinion of Lord *Kenyon* is conformable to that of Sir *Dudley Ryder*, in the caſe of *Cantillon* v. *Lond. Aſſurance.* (*a*) It does not however appear by the note of the caſe, that any of the deciſions ſubſequent to that caſe, were cited upon that occaſion. Indeed it would ſeem, from the manner in which Lord *Kenyon* delivered his opinion, that none of them had been mentioned; and as the defendant obtained a verdict upon another ground, the opinion delivered at the trial never became the ſubject of any further diſcuſſion.

This agrees with Lord C. J. *Ryder*'s doctrine in *Cantillon* v. *Lond. Aſſurance.*

The next caſe came before the court of King's Bench in 1792, and in that it was determined, that if a mob of rioters board a ſhip, and oblige the captain to ſell a quantity of corn at an inferior price; the loſs upon this is not in nature of a general average.—But if, in conſequence of this boarding, the ſhip be ſtranded, and a quantity of corn be loſt; this is a loſs by *ſtranding* within the memorandum, for which the inſured may recover upon a count applicable to ſuch loſs.

An inſurance was made on a cargo conſiſting of *wheat* and coals from *Youghall* to *Sligo*. The ſhip was forced, by ſtreſs of weather, into *Elly Harbour*, in *Ireland*, and there happening to be a great ſcarcity of corn at that time, the people came on board the ſhip in a tumultuous manner, took the government of her from the captain and crew, and weighed her anchor, by which ſhe drove upon a reef of rocks, where ſhe was ſtranded, and they would not leave her till they obliged the captain to ſell all the corn, except about 10 tons, at a certain rate. The 10 tons were, however, ſpoiled, in conſequence of the ſtranding, and obliged to be thrown overboard. The ſhip afterwards arrived at *Sligo* with the coals, which were but a ſmall part of the cargo.—There were two counts in the declaration; one alleging the loſs to have been by the *detention of certain people*; the other by *pirates*; but

A mob of rioters board a ſhip, and oblige the captain to ſell a quantity of corn at an inferior price; the loſs upon this, is not in nature of a general average. If, in conſequence of this boarding, the ſhip be *ſtranded*, and a quantity of corn be thereby loſt; this is a loſs by ſtranding within the memorandum; but the owner cannot recover for it, but upon a count for a loſs by ſtranding.

(*a*) Sup. 140.

Neſbitt v. *Luſhington*, 4 T. R. 783.

but no count for a loſs by *ſtranding*.—The inſured, never abandoned; and, as the cargo produced three-fourths of its original value, there could be no total loſs: There was, however, a verdict for the plaintiff, as for a total loſs.—Upon a motion to ſet aſide this verdict, it was contended, on the part of the inſured, that as the captain was obliged to let the people take the corn to induce them to ſpare the reſt of the cargo, this was a *general average*, and within the exception in the memorandum. But, even ſuppoſing this not to be a general average, yet that the meaning of the memorandum muſt be confined to the ſort of damage which is naturally incident to the commodities there ſpecified, being of a periſhable nature, and liable to a peculiar ſpecies of deterioration, not common to other articles; and that a loſs by irreſiſtible force, to which any other goods were equally liable, could never be within the meaning of the memorandum, which was to prevent diſputes in theſe articles ſubject to heat and putrefaction.—But the Court determined that the plaintiff could not recover in this action; becauſe the loſs upon the corn which was *ſold*, could not be imputed to the *ſtranding*; and, as to the 10 tons thrown overboard, though that was a loſs occaſioned by the ſtranding, yet the plaintiff could not recover for it, becauſe there was no count in the declaration applicable to ſuch a loſs.—Lord *Kenyon* ſaid, "that if a partial loſs could have been recovered upon this policy, the plaintiff might have recovered for the loſs by *pirates*. But as this was a policy on *corn*, the underwriter was liable for no average, unleſs general, or the ſhip were ſtranded. That this was not a *general average*, becauſe the whole adventure was never in jeopardy: For the perſons who took the corn, intended no injury to the ſhip, or any other part of the cargo but the corn; and therefore the owners of the corn could never have called on the other owners to contribute, as upon a general average. That the meaning of the memorandum was, that as it might be difficult to aſcertain whether a damage to the articles enumerated in it aroſe from accident, or the nature of the articles themſelves, this memorandum was inſerted in

The meaning of the memorandum is, that, in no caſe, the inſurer ſhall be liable for any

in all policies to prevent diſputes, by providing that the inſurer ſhould not pay any average on thoſe articles, unleſs general, or the ſhip were ſtranded.—That when the ſhip is ſtranded, the underwriters agree to aſcribe the loſs to the ſtranding, as being the moſt probable occaſion of the damage, though that fact cannot always be aſcertained."—Mr. Juſtice *Buller* agreed, "that there could be no general average, for the reaſons already given. And, as to the ſtranding, he ſaid the inſured were entitled to recover, *for any loſs occaſioned by ſtranding, provided it were an immediate and direct conſequence of the ſtranding*; (*a*) and therefore the loſs of that which was thrown overboard being aſcribable to the ſtranding, and being a direct and immediate conſequence of the peril inſured againſt, might have been recovered, had there been any count in the declaration, applicable to a loſs by ſtranding. But that the loſs upon the corn *taken by the rioters*, was not the conſequence of the ſtranding, but the rioters took poſſeſſion of the ſhip, in order to get at the corn; and this was the *cauſe*, and not the *conſequence* of the ſtranding."

partial loſs on the articles enumerated, unleſs it be a *general* average, or the ſhip be *ſtranded*; and he ſhall be liable for no other loſs, though it be of a nature to which any other commodity is equally liable. A loſs by ſtranding muſt be an immediate, not a remote conſequence of the ſtranding to be within the memorandum.

In the next caſe which occurs on this ſubject, Lord *Kenyon*, at *niſi prius*, adopts the principle of the caſes of *Maſon* v. *Skurray*, (*b*) and *Cocking* v. *Fraſer*; (*c*) namely, that, in the caſe of any of the articles enumerated in the memorandum, where the ſhip has not been ſtranded, the inſured cannot recover for any partial loſs, however great, which is not of the nature of a *general average*; and that, in ſuch caſe, he can only recover as for a *total loſs*; and then the voyage muſt either have been loſt, or the goods *wholly deſtroyed*.

If the ſhip be not ſtranded, the inſured cannot recover for any partial loſs however great, but only for a total loſs.

That was an inſurance on *fruit*, from *Liſbon* to *London*. It appeared that the ſhip was captured, re-captured, and brought

A cargo of fruit is captured and re-captured, & brought to the port of deſtination, but damaged 80 *per cent.* by the delay. In this caſe, as there has been neither a *ſtranding*, nor a total loſs

(*a*) This doctrine is conformable to the ſentiments of Lord *Mansfield* in the caſes of *Wilſon* v. *Smith*, ſup. 141, and *Cocking* v. *Fraſer*, ſup. 144. But ſince the caſe of *Burnet* v. *Kenſington*, which will be cited preſently, that doctrine has been quite exploded.—(*b*) Sup. 143.—(*c*) Sup. 144.

by the capture, the inſurer is not liable, either to a partial or a total loſs.

brought into *Portſmouth*, from whence ſhe afterwards came to *London*: That the cargo, in conſequence of the length of the voyage, occaſioned by the capture, had ſuſtained damage to the amount of 80 *per cent.*: That the inſured never heard of the capture, till the ſhip was ſafe at *Portſmouth*; and then offered to abandon.—Lord *Kenyon*, who tried the cauſe, ſaid,—"As there has been no *ſtranding*, there cannot be a recovery for a partial loſs. The queſtion then is, whether the inſured can recover as for a *total* loſs. Had the plaintiff *heard* of the capture only, he might have abandoned: But he hears nothing of the accident, till the ſhip is in ſafety. The cargo arrives at the port of deſtination; and though it is good for very little; yet it has invariably been held, that the voyage muſt either have been loſt, or the cargo, (if it be one of the articles mentioned in the memorandum,) muſt be wholly and actually deſtroyed, to entitle the inſured to recover."—The plaintiff was nonſuited.

Mc Andrews v. *Vaughan*, at N. P. after Mich. 1793, *Park* 114.

To recover in ſuch caſe as for a total loſs, the voyage muſt either have been loſt, or the goods wholly deſtroyed.

It may not be improper here to obſerve, that the concluding words of the learned Judge, taken in an unqualified ſenſe, might miſlead perſons not familiar with the law of inſurance. Under the memorandum, the inſured would be entitled to recover for *any partial loſs*, however ſmall, of the nature of a *general average*; for inſtance, he might recover his proportion of the ſalvage to the recaptors; his Lordſhip's words muſt therefore be underſtood, as he intended them, to relate only to the caſe before him, where the queſtion was, whether the inſured could recover for the particular damage done to his fruit, in conſequence of the *length of the voyage*, occaſioned by the capture, which was a partial loſs, not of the nature of general average.

It is now ſettled, that if the ſhip be ſtranded, the inſurer is liable for any partial loſs in any of the articles in the memorandum,

Thus far has remained undetermined, the important queſtion upon the conſtruction of the memorandum, whether the words, '*or the ſhip be ſtranded*,' make a *condition*, ſo as, upon a ſhip's being ſtranded, to let in the inſured to prove his whole partial loſs upon any of the articles,

articles in the memorandum, from whatever cauſe ſuch loſs might have ariſen, as it was originally held by Sir *Dudley Ryder*; *(a)* and afterwards by Lord *Kenyon*: *(b)* —Or whether thoſe words amount only to an *exception*; ſo that the inſurer ſhall be liable to partial loſſes ariſing from the ſtranding only; according to the opinion of Lord *Mansfield*, *(c)* and of Mr. Juſtice *Buller*. *(d)*—But at length in the following caſe, which is the laſt that has occurred on the conſtruction of the memorandum, this queſtion came directly before the court of King's Bench; and it was there, after ſolemn argument, and upon great conſideration, determined, that a ſtranding deſtroys the exception in the memorandum, and lets in the general words of the policy; and that therefore, where the ſhip has been ſtranded, the inſurer is liable for any partial loſs ſuſtained by any of the articles mentioned in the memorandum, though ſuch loſs did not ariſe from the ſtranding, but ſolely from another cauſe.

the ſtranding, but from ſome other cauſe.

In that caſe an inſurance was made on *fruit* on board the *Commerce*, "At and from *Malaga* and *Velez Malaga* "to *Plymouth* and *Portſmouth*."—An action was brought on this policy, and the plaintiff declared as for a total loſs of the goods inſured, by perils of the ſea, and the *ſtranding of the ſhip*.—Upon the trial of the cauſe, it appeared, that the ſhip, on the 29th of *January* 1795, in the courſe of the voyage, arrived off *Scilly*, and that morning ſtruck upon a ſunken rock about three leagues from the iſland. That ſhe did not remain on the rock; but in conſequence of the ſtriking thereon, ſeveral of her planks were ſtarted, and the water immediately flowed into the hold and over the cargo, and continued to increaſe in the hold for about three hours. That about noon

A ſhip, with a cargo of fruit, ſtruck on a ſunken rock, and received great damage, ſo that it became neceſſary to run her on ſhore in order to ſave both ſhip and cargo. The ſhip, however, arrived at her port of deſtination, but with the fruit greatly damaged, not by the *ſtranding*, but ſolely in conſequence of the ſtriking on the rock. The inſurer is liable for this partial loſs, though it did not ariſe

(a) In *Cantillon* v. *Lond. Aſſur.* ſup. 140.—*(b)* In *Bowring* v. *Elmſlie*, ſup. 145, and *Neſbitt* v. *Luſhington*, ſup. 147. —*(c)* In *Wilſon* v. *Smith*, ſup. 141, and *Cocking* v. *Fraſer*, ſup. 144.—*(d)* In *Neſbitt* v. *Luſhington*, ſup. 147.

from the ſtranding.

Burnett v. *Kenſington*, 7 T. R. 210. S. C. Eſp. Rep. 416.

noon the ſame day, the ſhip was ſtranded upon the beach at *Scilly*, by the captain, under the directions of the pilot from the iſland, in order to ſave the ſhip and cargo. That the ſhip continued ſome time on the beach, during which the water flowed in and over part of the cargo, at the return of the tide. That ſhe afterwards proceeded on her voyage, and arrived at *Plymouth* on the 24th of *February* with the greateſt part of her cargo. That the fruit was very much damaged, and a ſmall part of it left at *Scilly*, being entirely unfit for uſe. That the ſhip received no damage in conſequence of the *ſtranding*; but that the damage ſhe received was entirely from the rock on which ſhe ſtruck; which alone occaſioned the damage to the cargo, partly by the water which flowed into the ſhip previous, partly by that which flowed in ſubſequent, to the ſtranding.—There was a verdict for the plaintiff, ſubject to the opinion of the court upon the above facts. —The only queſtion was, whether, as the ſhip was in fact ſtranded in the courſe of her voyage, the inſurers were liable for a partial loſs, ariſing ſolely from the perils of the ſea, and not from the act of ſtranding.—The court after two arguments, were of opinion in the affirmative, that the plaintiff was entitled to recover the whole partial loſs.—Lord *Kenyon* ſaid, —"The words of the policy are general, including all caſes: Then comes the memorandum, "corn, "fiſh, ſalt, fruit, flour, and ſeed, warranted free from "average, *unleſs general* or *the ſhip be ſtranded*." This therefore, lets in a general average; and I do not know how to conſtrue the words grammatically, but by ſaying, that *if the ſhip be ſtranded, that deſtroys the exception, and lets in the general words of the policy*. If a general proviſion be made in any inſtrument, and it be there ſaid, that certain things ſhall be excepted, unleſs another thing happen; if that other thing do happen, it deſtroys the exception, and gives effect to the general operation of the deed.—Without entering into the reaſons for introducing this exception, on the grammatical conſtruction of the whole, I have no doubt.—The caſe of *Cantillon* v. *Lond. Aſſ. Comp.* as ſtated by Sir *Fletcher Norton*, in 3 *Bur.* 1553

If the ſhip be ſtranded, that deſtroys the exception, and lets in the general words of the policy.

1553, (*a*) which is better authority than *Magens*, is a judicial deciſion on the very point, by a jury of merchants, under the directions of Lord C. J. *Ryder*, who held that the words, "*or the ſhip be ſtranded*" amounted to a *condition*, and that, by the ſhip's being ſtranded, the inſured was let in to claim his whole partial loſs. This deciſion was acquieſced in at the time, and the inſurance companies altered the form of their policies in conſequence of it. Generally ſpeaking, if I were bound to decide between the opinions of Lord *Mansfield* and Lord C. J. *Ryder*, perhaps I ſhould be guided by the former in preference to the latter: But what fell from him in the caſe of *Wilſon* v. *Smith* (*b*) was only an *obiter dictum*; and I confeſs it does not bring conviction to my mind. With regard to *Cocking* v. *Fraſer*, (*c*) it is ſufficient to ſay, that there was no ſtranding in that caſe: What was there ſaid was likewiſe an *obiter dictum*; and I cannot ſubſcribe to the opinion there given, that '*if the commodity ſpecifically remain, the underwriter is diſcharged:*' But if fiſh be deteriorated by the accident of *ſtranding*, the underwriters would be anſwerable, though the article ſpecifically remained. If it had been intended that the underwriters ſhould only be anſwerable for the damage that ariſes in conſequence of the ſtranding, a ſmall variation of expreſſion would have removed all difficulty; they would have ſaid, unleſs for loſſes *occaſioned* by ſtranding: But, in the body of the policy, they have inſured againſt all loſſes from the cauſes there enumerated, which include ſtranding; and then follows this memorandum, the evident meaning of which is, 'free from average unleſs general or *unleſs* the ſhip be ſtranded:' So that, if the ſhip be ſtranded, the inſurers ſay they will be anſwerable for an average loſs. That appears to me to be the true ſenſe and grammatical conſtruction of the policy; and thinking ſo, I am bound to give the ſame opinion I formerly gave, (*d*) not becauſe I gave that opinion before, but becauſe I am convinced by the reaſoning that led to it."

(*a*) Sup. 140.—(*b*) Sup. 141.—(*c*) Sup. 144.—(*d*) In the caſes *Neſbitt* v. *Luſhington*, ſup. 147, and *Bowring* v. *Elmſlie*, ſup. 145.

it."—Mr. Juſtice *Aſhurſt* ſaid,—"As it is difficult, where a ſhip is ſtranded, to determine whether or not the damage to the cargo aroſe from the ſtranding, or in what degree it was imputable to that cauſe, this memorandum ſeems to have been introduced to avoid that inquiry, and that, when the ſhip has been ſtranded, the inſurers conſent to aſcribe the loſs to that cauſe. This conſtruction, which has already been put on the memorandum in the caſes of *Cantillon* v. *Lond. Aſſ. Comp.* and *Neſbitt* v. *Luſhington*, will prevent endleſs litigation."—Mr. Juſtice *Lawrence* ſaid,—"Although the jury found that part of the damage happened *after* the ſtranding; it is alſo found as a fact, that the ſhip received no damage *in conſequence of the ſtranding*; and if the ſhip had not been ſtranded, both the ſhip and cargo would have been totally loſt. The queſtion, therefore, is, whether an average loſs is payable to any amount, however great, *from whatever cauſe it may ariſe*, if the ſhip happen to be ſtranded. If the exception in the memorandum be confined to loſſes *ariſing* from the ſtranding, it muſt be from this conſideration, that otherwiſe it might be a temptation to the maſter to ſtrand the ſhip, if any trifling damage were done to the cargo, to enable the inſured to recover.—However, where the words of the policy are inaccurate, and where there are inconveniences attending each conſtruction of it, if the caſe has ever been decided, I think we ought to be guided by it. In the caſe of *Wilſon* v. *Smith*, Lord *Mansfield* ſeemed to think, that the word "*unleſs*" did not create a *condition*; but that the meaning of the exception was, that the underwriters ſhould only be liable for a partial loſs in two caſes, one where there is general average, the other where the damage *ariſes* from the ſtranding. But, in ſo conſidering it, Lord *Mansfield* went beyond the facts of the caſe then before the court; for there the queſtion was, whether the inſured was entitled to recover a partial loſs from the circumſtance of his being entitled to a general average: Now the words of the exception are not "warranted free from average, *unleſs there be a general average*, or unleſs the

the ſhip be ſtranded;" but warranted free from average, "unleſs general, or the ſhip be ſtranded." Therefore, as there is a difference in the expreſſion of theſe two exceptions, perhaps it may be conſidered as a *condition*, as applied to the *ſtranding*, though it be not a condition, as applied to the *average*. If ſo, then there is only one authority in point, that of *Cantillon* v. *Lond. Aſſurance*, in which caſe it was conſidered, that the ſtranding was a condition, and that the underwriters were liable on the happening of that condition. Therefore, as the very queſtion has been once decided, I think it ought to govern our deciſion in this caſe, eſpecially as the queſtion ariſes on the conſtruction of an inſtrument ſo inaccurately penned as a policy of inſurance.

Whether the memorandum exempts the inſurer from the *total loſs* of an *entire* individual.

Notwithſtanding the number of caſes which have been decided upon the conſtruction of the memorandum, it ſtill remains a queſtion, whether the partial loſſes from which the inſurer is exempted by it, comprehend the *total loſs* of an *entire individual*, as well as a partial injury to the *whole* of the ſpecies of goods exempted by the memorandum from ſmall average loſſes: As if out of 101 hogſheads of ſugar of equal value, 5 are ſo completely ſpoiled in the voyage as to be worth nothing, and therefore *totally loſt*.—If this loſs be calculated upon the whole 101 hogſheads, it will not amount to 5 *per cent.*—In ſuch a caſe, it has been thought, that the inſurer would be protected by the memorandum, and not liable for the loſs. (*a*) As the queſtion has never been directly agitated in our courts, I will not preſume to ſay how it ought to be decided.

Sect.

(*a*) Vid. 1 *Mag.* 73, 2 *Bur.* 1170, inf. ch. 14. § 1.

Sect. 4.

For what loſſes the owners and maſter of the ſhip are liable.

There are loſſes which do not ariſe from the perils of the ſea, and for which the owners are liable.

THERE are certain injuries and loſſes to which goods on ſhip-board are expoſed, which cannot properly be ſaid to ariſe from the perils of the ſea; but are imputable to the owners of the ſhip, or to the negligence or miſconduct of the perſons employed by them on board. In all ſuch caſes, the owners, in reſpect of the freight, are anſwerable to the owner of the goods, for ſuch loſs or damage, ſubject, however, to certain regulations and reſtrictions which we ſhall preſently have occaſion to notice.

As if damage happen to goods on board by the fault of the ſhip, not occaſioned by ſea damage.

Thus, if any loſs or damage happen to the goods, from any fault or defect of the ſhip, not ariſing from the violence of the wind or ſea, or from any accident or misfortune in the voyage, but from ſome latent defect before ſhe ſailed; the owner of the goods has his remedy againſt the owners of the ſhip, for ſuch loſs or damage; and the inſurer, in ſuch caſe, is not liable, becauſe, in every contract of inſurance, there is an implied warranty, that the ſhip is ſea-worthy; and if it appear that ſhe was not ſo, the contract is void. (*a*)

In many caſes the maſter alſo is liable.

In many caſes, the maſter alſo, as well as the owners, is anſwerable; for though his appointment gives him no property in the ſhip, either general or ſpecial, yet it is the policy of the law to hold him reſponſible for all loſs or damage that may happen to the goods committed to his charge, whether it ariſe from the negligence, ignorance, or wilful miſconduct of himſelf or his mariners, or any other on board the ſhip. As ſoon, therefore, as goods are put on board, they are in the maſter's charge; and he is bound to deliver them again in the ſame ſtate in which they were ſhipped; and he, as well as the owners,

He is bound to deliver goods in the ſame ſtate in which he received them. And he as well as the owners, is liable for all loſs or damage not proceeding

(*a*) Vid. *Val.* tom. 1, p. 654. *Pothier*, h. t. n. 66. *Emerig.* tom. 1, p. 580.

ers, is anſwerable for all loſs or damage they may ſuſtain, unleſs it proceed from an inherent defect in the article, or from ſome accident or misfortune, which could not be foreſeen or prevented. The maſter, therefore, as well as the owners, is liable for all injuries occaſioned by bad ſtowage, or the goods being expoſed to wet; for loſſes by theft or embezzlement of the maſter or mariners on board; (*a*) and alſo for damage done by rats, unleſs it appear that all neceſſary precautions were uſed to prevent it. (*b*)—This is the rule of the marine law, (*c*) and with it agrees the common law of *England*, which conſiders the owners, as well as the maſter, as common carriers, and anſwerable for all loſſes, except ſuch as ariſe from the act of God, the King's enemies, or the perils of the ſea. This is ſtrongly exemplified in the following caſe.

from ſome inevitable misfortune.

They are anſwerable for loſs or damage occaſioned by bad ſtowage, wet, theft, embezzlement, rats, &c.

This is the rule of the marine law, and agrees with the common law.

A quantity of goods were ſent on board a ſhip, and after they were ſtowed, a number of perſons, under pretence of being preſs-maſters, entered the ſhip in the night, and robbed her of the goods.—An action being brought againſt the maſter, by the owner of the goods, it was contended on the part of the maſter, that no negligence was imputable to him; that he had a ſufficient guard on board, and the goods were all locked up under the hatches, and that the thieves came as preſs-maſters, and by force robbed the ſhip: that this was that ſort of *vis major*, which he could not reſiſt; and that though he was maſter of the ſhip, yet he had no ſhare in her, and was only in nature of a ſervant, acting for a ſalary. —But the court determined that the plaintiff was entitled to recover: For the maſter at his peril, muſt ſee that all things are forthcoming that are delivered to him, whatever accident may happen, the act of God, or the King's enemies, and the perils of the ſea, only excepted: But for fire, thieves, and the like, he muſt anſwer, as a common

If a number of perſons enter a ſhip, under pretence of being a preſs gang, and with violence rob the ſhip of goods on board, the maſter ſhall anſwer for theſe goods, though he had taken all proper precautions to ſecure the goods, and though he was unable to reſiſt the robbers.

Morſe v. *Slue*, *Molloy*, b. 2. c. 2. § 1. S. C. 1 *Vent.* 190. 238. T. *Ray.* 220. 1 *Danv.* 12. 3 *Keb.* 72. 112. 135.

(*a*) *Mal.* lex merc. 117, 118. *Le Guidon*, c. 5, art. 5 and 6, *Cleirac*, p. 254, *Roc.* n. 49, *Emerig.* vol. 1, p. 377.—(*b*) *Emerig.* vol. 1, p. 377.—(*c*) Vid. *Roc.* n. 49, *Cleirac*, p. 254, *Le Guidon*, c. 5. art. 5 and 6, *Molloy*, b. 2. c. 1. § 5, and c. 2. § 2.

common carrier, and though he has no ſhare in the ſhip, and only receives a ſalary, yet he is *a known public officer*, whom the law looks upon as anſwerable; and the owner of the goods has his election to charge either the maſter or the owners, or both, at his pleaſure; but he can have but one ſatisfaction.

This carries the principle of reſponſibility farther than the marine law carries it.

I take this caſe from *Molloy*, though it is reported in various other books, becauſe he himſelf appears to have argued it. It ſeems to carry the principle of reſponſibility farther than it is carried by the marine law. Simple theft or embezzlement by perſons on board, not being attributable to accident, is not deemed a peril of the ſea. (*a*) But *robbery* is a peril which cannot be foreſeen or prevented. (*b*) An inſurer is not anſwerable for ſimple theft by perſons on board the ſhip; becauſe it may be reaſonably attributed to the want of proper vigilance in the maſter: But he is liable for a robbery, committed with violence, by perſons not belonging to the ſhip; for the word *thieves* in the policy means thieves *aſſailing from without*, and not thieves among the crew. (*c*) Robbery, in this ſenſe, is a ſpecies of piracy; indeed the only difference between robbery and piracy is, that the one is generally underſtood to be a plundering on land, the other a plundering at ſea. *Inter piratam et latronem nulla alia eſt differentia, niſi quia pirata depredator eſt in mari.* (*d*)—The robbery mentioned in the above caſe, unqueſtionably amounted to piracy, according to the opinion of Lord *Kenyon* in *Neſbitt* v. *Luſhington*, (*e*) though it was committed in the river *Thames*; and this, by the marine law, is a peril of the ſea: But the court, aſſimilating the caſe of a maſter of a ſhip, to that of a common carrier, held it no excuſe that the defendant had taken all proper precautions for the ſafety of the goods, and that the robbery had been committed by perſons *aſſailing from without*, and with a force which he was unable to reſiſt.—It is to be obſerved, however, that it appears

(*a*) Furtum non eſt caſus fortuitus. *Roc.* n. 42.—(*b*) Latrocinium fatale damnum, ſeu caſus fortuitus eſt. *Roc.* n. 43. —(*c*) *Malyne*, c. 25. *Beawes* 313, 5th ed.—(*d*) Santerna p. 4. n. 50.—(*e*) Sup. 147.

appears from the report of this caſe in *Ventris*, that Lord C. J. *Hale*, in delivering the opinion of the court, ſaid, "that this caſe was not to be meaſured by the rules of the admiral law; becauſe the ſhip which, at the time of the robbery, lay in the river *Thames*, was *infra corpus comitatus*; and therefore the caſe did not differ from that of a common hoyman." (*a*)

If goods are delivered to the maſter on ſhore, he is anſwerable for them as much as if delivered on board the ſhip. (*b*) So is he anſwerable by the general law for the ſafety of the goods from plunder or damage, while they are in his boats or barges to be put on board or landed; becauſe thoſe boats or barges are conſidered as attached to, and making a part of the ſhip. And if any loſs or damage happen in the ſhipping or landing of the goods, through the fault of the maſter or his crew, or the defect of the ſhip's tackle, the maſter and the owners are reſpectively anſwerable. If the loſs or damage, in ſuch caſe, be not imputable to the maſter or crew, or to the defect of the ſhip's tackle, then the inſurer is anſwerable. (*c*) But, till the goods are ſafely landed and delivered to the conſignee, the liability both of maſter and owners continues. (*d*)

If a loſs happen in the ſhipping, or of landing goods, by the fault of the maſter or crew, or the defect of the ſhip's tackle, the owners and the maſter are each liable.

At common law, this liability of the owners and maſter of the ſhip extended to the full amount of the loſs; and the *maſter's liability* ſtill remains the ſame. But it was found that the liability of the owners of ſhips to *the amount of the full value* of goods put on board, and made away with by the maſter or mariners, very much tended to diſcourage perſons from adventuring their fortunes as ſhip-owners, therefore the ſtat. 7 G. II. c. 15. provides,

At common law, the owners and maſter were liable to the full value of the goods loſt. But now, by 7 G. II c. 15. they ſhall only be liable to the value of the ſhip and freight for any act done by the maſter or mariners.

(*a*) Vid. 1 *Vent.* 238.—(*b*) Nauta qui recepit à Titio merces in littore maris, ſi ibi merces perierint, periculo ipſius nautæ pereunt, tanquam ſi eſſent in navi receptæ, et hoc procedit quia ſufficit nautam ſic recipiſſe, & propterea in ejus periculo ſunt. *Roccus* de navib. n. 88.—(*c*) *Le Guidon*, c. 5. art. 7. Vid. Laws of *Oleron*, art. 10, Laws of *Wiſbuy*, art. 49, *Emerig.* vol. 1. p. 678.—(*d*) *Emerig.* vol. 1. p. 679.

provides, 'That no owner of any ſhip ſhall be liable for 'any loſs or damage occaſioned by any embezzlement, 'ſecreting, or making away with any gold, ſilver, jewels, 'or other merchandize on board, or for any act, matter, 'damage, or forfeiture, done or incurred, by the maſter 'or mariners, without the privity or knowledge of the 'owners, further than the value of the ſhip, and the 'freight due for the voyage; and where there are ſeve-'ral proprietors of the goods on board, and the value of 'the ſhip and freight be inſufficient to compenſate for 'the loſs of each; they ſhall receive an average in pro-'portion to their reſpective loſſes.—And they, as 'well as the owners of the ſhip, may exhibit a bill for 'a diſcovery of the amount of the loſs, and the value of 'the ſhip, and for a diſtribution thereof; and if ſuch 'bill be exhibited by the owners, they ſhall annex an 'affidavit that they do not collude with the defendants. '—But it is provided, that this act ſhall not leſſen the 'remedy againſt the maſter and mariners, in reſpect of 'ſuch embezzlement,' &c.

But as this proviſion only extended to the caſe of embezzlement, &c. by the maſter or mariners, it did not afford a ſufficient protection to ſhip owners. Therefore the 26 *G.* III. c. 86. limits the liability of the owners to the value of the ſhip and freight, though the maſter or mariners ſhould not be privy to ſuch robbery, &c and they are exempt from all liability for any loſs by fire.

As this act extends only to caſes where the embezzlement, &c. is committed by the maſter or mariners, it was not found a ſufficient protection to ſhip-owners; and therefore the ſtat. 26 *G.* III. c. 86, recites, "That all maſters and owners of ſhips are, by law, reſpectively liable to anſwer for the full value of all goods ſhipped on board, notwithſtanding ſuch goods be loſt by robbery, fire, or other accident, (other than the King's enemies, the perils of the ſeas, or the act of God,) or unleſs the maſter or ſome of the ſhip's company be privy to ſuch robbery, in which caſe alone the reſponſibility of the owners is, by the ſtat. 7 *G.* II. c. 15. limited to the value of the ſhip and freight." It then enacts, 'That no 'owner ſhall be anſwerable for any loſs or damage by 'reaſon of any robbery, embezzlement, &c. of any goods 'on board, or for any act, &c. done without their pri-'vity or knowledge, beyond the value of the ſhip and 'freight, although the maſter or mariners ſhall not be 'concerned in the robbery, &c.; nor anſwerable for any 'loſs or damage to goods occaſioned by fire on board; 'nor

'nor ſhall the maſter or owners be liable for the loſs of 'any gold, ſilver, jewels, &c. by means of any robbery, '&c. unleſs the ſhipper inſert in the bill of lading, or 'otherwiſe declare, the quality and value thereof.'

From theſe parliamentary regulations it appears, that though the reſponſibility of the maſter, except in the inſtance mentioned in the laſt clauſe, remains the ſame as it was before; yet, that of the owners is limited to the value of the ſhip and freight, in all caſes of theft, embezzlement, &c. without their privity, whether by the crew, or by ſtrangers; and that they are wholly exempt from all loſſes occaſioned by fire.

But though the owners are reſponſible to the amount of the value of the ſhip and freight, for loſſes occaſioned by external thieves; yet, under the policy, the inſurers are alſo liable; (*a*) and therefore, in ſuch caſes, the proprietor of the goods, or the inſurers in his name, may recover againſt the owners.

But the inſurer as well as the owner of the ſhip is liable for external thefts.

Sect. 5.

What ſhall be the Duration of the Riſk.

TO charge the inſurer, it is not enough that a loſs has happened at ſea; it muſt appear to have happened in the courſe of the voyage, and during the continuance of the riſk, inſured. (*b*)

To charge the inſurer, the loſs muſt happen during the continuance of the riſk.

Every voyage inſured muſt have a *terminus à quo* and a *terminus ad quem*. When the inſurance is for a limited time, the two extremes of that time are the *termini* of the voyage inſured. When a ſhip is inſured, both outward and homeward, for one entire premium; this, with reference to the inſurance, is conſidered but as one voyage; and the *terminus à quo* is alſo the *terminus ad quem*.

Every voyage inſured muſt have a fixed commencement and end.

We will conſider the duration of the riſk, *firſt*, with reference to inſurances upon *goods*, *ſecondly*, upon the *ſhip*, and *thirdly*, upon *freight*.

1. *Upon*

(*a*) *Harford* v. *Maynard*, coram Lord *Mansfield* at G. H. Hil. vac. 1785, *Park* 25.—(*b*) *Roccus*, h. t. n. 18.

1. *Upon Goods.*

The time of the commencement and end of the riſk *on goods* in other countries.

By the ordinances of *France*, and of moſt other countries, it is provided, that if the time of the riſk be not regulated by the contract, it ſhall commence, *as to goods*, from the time they are put on board the ſhip, or put into barges, to be conveyed on board, that is, from the moment they leave the ſhore; and it continues till they are ſafely landed at the place of their deſtination. And the inſurer does not only run the riſk while the goods are in the ſhip named in the policy, but alſo in the boats or lighters that ſhall be employed in bringing them on board and carrying them on ſhore. The reaſon aſſigned for this is, becauſe the perils of the ſea commence from the moment the goods are on the water. (*a*)

In England.

In our policies, the words uſually employed to expreſs the commencement and end of the riſk on goods are theſe,—'Beginning the adventure upon the ſaid goods 'and merchandizes *from the loading thereof aboard the ſaid ſhip*, 'and ſo ſhall continue and endure until the ſaid ſhip with 'the ſaid goods, ſhall be arrived at [her port of 'delivery,] and until the ſame be diſcharged and ſafely 'landed.' So that, with us, it is plain that the riſk does not commence until the goods are actually on board the ſhip; and therefore the inſurer is not anſwerable for any loſs or damage which may happen to them, while they are on their paſſage to the ſhip. And it may be laid down as a general rule, that the riſk on goods continues no longer than they are actually on board the ſhip mentioned in the policy; and that if they be removed from on board that ſhip and landed, or put on board another ſhip, without the conſent of the inſurers, the contract is at an end, and the inſurers are diſcharged from all ſubſequent reſponſibility.

In general, the riſk continues on goods while they are on board the ſhip mentioned in the policy.

But to this rule there are certain exceptions, founded in neceſſity, which it will be proper to mention in this place.

But to this rule there are exceptions.

As where the ſhip is diſabled and the goods are put on board another veſſel to be forwarded to their port of delivery.

Where the ſhip is diſabled in the courſe of the voyage, ſo as to be incapable of proceeding to her port of deſtination, and it becomes neceſſary to ſhift the goods inſured on

(*a*) Vid. 1 *Mag.* 44. *Emerig.* tom. 1. p. 14. Ord. of *Louis* XIV, tit. *Contrâts à la groſſe*, art. 5.

on board another veſſel, in order to be conveyed thither: In that caſe, though it has been thought that the inſurers are thereby diſcharged, (*a*) yet it is now clearly ſettled, that the riſk continues, and that the inſurers are liable for any loſs that may happen to the goods on board the new ſhip. (*b*)

So, if it be agreed that the goods inſured, may, at a particular place, in the voyage, be removed from on board the ſhip in which they are to be brought thither, and put on board other ſhips to be carried to their port of delivery; but, on their arrival at the place, there being no ſhips to receive them, they are put on board a *ſtore-ſhip*, which is ſtationary there, to be kept till ſhips bound to their place of deſtination arrive: In this caſe, the riſk continues on the goods on board the ſtore-ſhip, and if they be loſt on board her, the inſurer is anſwerable. This was determined in the following caſe.

So, if it be agreed, that the goods ſhall be removed into another ſhip at a particular place in the voyage, and there being no ſhip there, they are put on board a ſtore-ſhip.

An inſurance was made *on goods* in a *Dutch* ſhip,—"From "*Malaga* to *Gibraltar*, and at and from thence to *Eng-* "*land* and *Holland*, both or either; the adventure to "begin from the loading, and continue till the ſhip and "goods arrive ſafely in *England* or *Holland*, and are there "ſafely landed."—"It was agreed, that upon the ar- "rival of the ſhip at *Gibraltar*, the goods might be un- "loaded and reſhipped on board one or more *Britiſh* ſhip "or ſhips for *England* and *Holland*, and to return one "*per cent.* if diſcharged in *England*."—In an action on this policy, it appeared in evidence, that when the ſhip came to *Gibraltar*, the goods were unloaded and put into a *ſtore-ſhip*, (which it was proved was always conſidered as a warehouſe,) and that there was then no *Britiſh* ſhip there. Two days after, the goods on board the *ſtore-ſhip*, were loſt in a ſtorm.—In an action on the policy, it was inſiſted for the defendant, that the inſurance was only on goods on board the *Dutch* and *Britiſh* ſhips, and that it did not extend to the ſtore-ſhip, which is

Goods inſured from *A.* to *B.* with liberty to put them in one or more ſhip or ſhips, at *C.* to be forwarded to *B.* their place of deſtination.—There being no ſhips at *C.* when the goods arrive, they are put on board a ſtore-ſhip till ſhips do arrive;—The riſk continues in the ſtore-ſhip.

Tierney v. *Etherington*, cited 1 *Bur.* 348.

(*a*) Vid. *Molloy*, b. 2. c. 7. § 11.—(*b*) The ſubject of *changing the ſhip* will be found fully treated, inf. chap. 11, § 3.

is conſidered as a warehouſe at land, and ſo not a peril of the ſea.—But it was ruled by Lord C. J. *Lee*, that the plaintiff was entitled to recover;—'For,' ſaid his Lordſhip, 'in the conſtruction of policies, the *ſtrictum jus*, or *apex juris*, is not to be laid hold of; but they are to be conſtrued largely for the benefit of trade, and for the inſured. But it would be a ſtrict conſtruction to confine this inſurance to the unloading and reſhipping, and the accidents attendant thereon. The conſtruction ſhould be *according to the courſe of trade in this place*, where the uſual method of unloading and reſhipping is, that when there is no *Britiſh* ſhip there, then the goods are kept in ſtore-ſhips. Where there is an inſurance on goods on board ſuch a ſhip, that inſurance extends to carrying the goods on ſhore in a boat. So, if an inſurance be on goods to ſuch a *city*, and the goods are brought in ſafety to ſuch a *port*, though diſtant from the city, that is a compliance with the policy, if that be the uſual place to which the ſhips come. Therefore, as here is a liberty given of unloading and reſhipping, it muſt be taken to be an inſuring under ſuch methods as are proper for unloading and reſhipping. There is no neglect on the part of the inſured, for the goods were brought into port the 19th and loſt the 22d of *November*. This manner of unloading and reſhipping is to be conſidered as the neceſſary means of attaining that which was intended by the policy, and ſeems to be the ſame as if it had happened in the act of unſhipping from one ſhip to another. This is not to be conſidered as a ſuſpenſion of the policy; for as the policy would extend to a loſs happening in the unloading and reſhipping from one ſhip to another, ſo any means to attain that end come within the meaning of the policy.'—Accordingly the plaintiff had a verdict.—A new trial was moved for; but it was refuſed by Lord C. J. *Lee*, Mr. Juſtice *Chapple*, and Mr. Juſtice *Deniſon*; againſt the opinion of Mr. Juſtice *Wright*; who thought that it was a removal at the peril of the inſured.

Policies are to be conſtrued largely for the benefit of trade.

An inſurance on goods extends to carrying them on ſhore.

If an inſurance on goods be to ſuch a *city*, it is ſufficient to bring them to the *port* to which goods deſtined for that city are uſually ſent.

But the words of the above clauſe ſhew, that the riſk on goods, in *Engliſh* policies, like foreign ones, continues till they are "*diſcharged, and ſafely landed*" at the port of delivery.

And the inſured is protected by the policy in carrying the

ery.—And the inſured has a right to land them at any wharf or place, within the port, where ſuch goods are uſually landed.—For inſtance, all the ſhips laden with hemp for the port of *London*, do not land it at the cuſtom houſe; but it is often carried down the river in lighters, and landed at different wharves on each ſide of the river. If, therefore, a cargo of hemp be inſured from a foreign port to the port of *London*, and the conſignee be deſirous of landing it at *Woolwich*, *Chatham*, or any other place within the port of *London*, where hemp is uſually landed, it would ſeem that he might ſend it in lighters from the ſhip to ſuch place under the protection of the policy. For policies of inſurance ought always to be conſtrued according to the courſe of trade in the place; and miſtakes and doubtful paſſages ought to be interpreted in favour of the inſured. (*a*)

goods in lighters to any part of the port of delivery, where ſuch goods are uſually landed.

Policies ought to be conſtrued according to the uſage of trade, and in doubtful caſes, in favour of the inſured.

But though the general rule is, that the inſurance on goods ſhall continue "*till they are diſcharged and ſafely "landed,*" yet it has been holden, by a very eminent and learned judge, that if the inſured take goods from on board the ſhip in his own lighter, the inſurer is diſcharged.

Thus:—Goods were inſured to *London*, "*and until the ſame ſhould be ſafely landed there.*"—On the ſhip's arrival, the owner of the goods ſent *his own lighter*, and received them out of the ſhip; but before they reached the ſhore, an accident happened, by which they were damaged.—For this loſs, an action was brought againſt the inſurer.—On the part of the defendant, it was inſiſted, that the accident happening after the owner had taken the goods into his own poſſeſſion, it was a loſs after the inſurance was ended.—To this it was anſwered, that if this had been an action againſt the maſter or owners of the ſhip, that objection would have been a good anſwer to it, for they were certainly diſcharged: But in this action it would be no anſwer; for it might as well be ſaid, that during the whole voyage, the goods were in the poſſeſſion of the inſured, who took the ſhip to freight, and whoſe ſervant the maſter was, to this purpoſe, as much as the lighterman: That, in the caſe of ſhips of great burthen, which are forced to lie off, there may be a carriage of many

If the owner of goods inſured take them from on board the ſhip in his own lighter, the inſurer is diſcharged.

Sparrow v Carruthers, at N.P. 2 *Str.* 1236.

(*a*) 1 *Mag.* 48.

many miles in boats and lighters, and it was in the courſe of trade for the owner of the goods to ſend his lighter. —But Lord C. J. *Lee* held, that the inſurer was diſcharged.—He ſaid it would have been otherwiſe if the goods had been ſent by the ſhip's boat, which is conſidered as part of the ſhip, and its paſſage part of the voyage. The jury (of merchants) thought it turned on that diſtinction, and found a verdict for the defendant accordingly.

Obſervations on this caſe.

But it would ſeem, that if it were the uſage of a particular trade, that all the goods in that trade ſhould be landed by the owners of ſuch goods in their own lighters, the riſk would continue even in thoſe lighters, otherwiſe the words of the policy "*until ſafely landed*," would, as far as related to that particular trade, be nugatory. And the principles laid down by the ſame learned judge, in the caſe of *Tiernay* v. *Etherington*, (*a*) ſeem to warrant this diſtinction.—The two following caſes will ſhew, that the riſk continues on goods on board a common public lighter, though hired and employed by the owner of the goods for the purpoſe of landing them; this being done in the ordinary courſe of trade.

Where goods are put into a public lighter for the purpoſe of being landed, the riſk continues: But if the merchant ſend *his own lighter*, this will be a delivery to him, and the inſurer is diſcharged.

Rucker v. *Lond. Aſſur. coram Buller* J. at N.P. *June* 8, 1784.

An inſurance was made on the ſhip *Sophia*, and on goods on board, "At and from *Grenada* to *London*;—on the ſhip till moored 24 hours, and on the goods, till diſcharged and ſafely landed."—In an action on this policy, the declaration ſtated, that before the goods, which conſiſted of ſugars, were diſcharged and landed, they, by the perils of the river *Thames*, and the waters thereof, were waſhed away and loſt.—On the trial it appeared, that the owners of the goods, for the purpoſe of landing them, had employed one of the public lightermen, who work on the river for hire, and whoſe lighters are numbered and entered at *Waterman's Hall*, without which no lighter is allowed to work on the river. On board of this lighter were put 57 hogſheads of ſugar; and there were two men on board, (the uſual complement for a lighter,) beſide the ſecond mate of the ſhip. The lighter, as

(*a*) Sup. 164.

as it was proceeding to the ſhore, ſtruck upon the anchor of a ſhip, and ſunk through unavoidable accident, and without any imputation of negligence in any perſon on board. The ſugars being much damaged, the plaintiff went for the average loſs.—On the part of the defendant, it was contended, that though, by the policy, the riſk was to continue till the goods were ſafely landed, and this was underſtood to mean, by the ſhip's boats, yet the cuſtom of trade had, in ſome inſtances, ſubſtituted lighters. But here the merchants had taken upon themſelves to employ the lighter, and this not being in the courſe of trade, the underwriters were diſcharged from the ſubſequent loſs; for a merchant may, for his own convenience, depart from the uſual courſe of trade.—Mr. Juſtice *Buller*, in his addreſs to the jury, ſaid;—"The deciſion of this cauſe depends on the uſage; but the fact of uſage being once eſtabliſhed, the queſtion whether the underwriter is liable or not is matter of law. But it belongs to the jury to ſay, whether that which has been done here, be or be not within the uſual courſe of trade. The diſtinction is between *public* lighters, and thoſe which are the property of the merchant, and work only for him. Public lighters have a *ſtamp of authority*. They are entered at *Waterman's Hall*. The caſe of *Sparrow* v. *Carruthers*, does not affect this caſe. If a merchant will not ſend public lighters, it ſhall be a delivery to him when the goods are put on board his own lighter. But lightermen, appointed by the waterman's company, are *public officers*, and have a public credit."—The jury adopted this opinion, and found for the plaintiff.

A ſhip and goods were inſured from *Peterſburgh* to *London*. In an action upon the policy, it appeared, that the ſhip and cargo, conſiſting of hemp, arrived ſafe in the *Thames*: That the plaintiffs being the conſignees of the goods, employed a lighterman belonging to one of the public lighters, entered at *Waterman's Hall*, to land the hemp: That the hemp was damaged on board the lighter, but without any negligence imputable to the lighterman: That it is the conſtant practice for merchants in the *Ruſſian* trade to land their goods by means of

The conſignee of goods in the port of *London* employs a common lighterman to land them. In the paſſage to the ſhore, the lighter is ſunk by unavoidable accident.—This is a loſs within the policy.

Hurry and others, v. *Roy. Ex. Aſſur.* C. B. *Eaſter*, 1801.

lighters, and that there are no other lighters now in uſe among the merchants, but the public lighters.—Upon theſe facts, a verdict was found for the plaintiffs, with liberty to the defendants to move to enter a nonſuit, on the ground, that the inſurance was diſcharged by the delivery of the hemp into the lighters employed and paid by the conſignees of the cargo.—Upon this being moved, it was contended on the part of the defendants, that the rule laid down in the above caſe of *Sparrow* v. *Carruthers*, (*a*) muſt apply to this caſe, the poſſeſſion of the goods being altered, by the owner taking them into his own cuſtody; and that it made no difference whether the lighter was public or private, becauſe the perſon who hired it, made it his own *pro hâc vice*, and that the goods, while on board it, were completely in his own cuſtody.—But the court (*b*) determined that the defendants were anſwerable for the loſs which happened in the lighter.—Mr. Juſtice *Heath* ſaid,—"The queſtion in this caſe is, whether the goods inſured have been *ſafely landed*, within the meaning of the policy. To every part of the policy we muſt give effect. It is admitted, that the unloading of *Ruſſian* ſhips is entirely carried on by public lighters, and that no private lighters are ever employed in that buſineſs. Then, what effect is to be given to the words, "*until the goods are ſafely landed*," if they do not extend to the goods when on board the public lighter; for in no other manner can they be ſafely landed. It is true, that the maſter and owners of the ſhip were diſcharged, when the goods were put into the lighter; but the freight and inſurance are not commenſurate; the latter is far more extenſive than the former. As to the caſe of *Sparrow* v. *Carruthers*, I think it ought not to be extended. It was only a *niſi prius* deciſion, which, though often cited, has never been recogniſed. I do not mean, however, to quarrel with that deciſion."—Mr. Juſtice *Rooke* ſaid,—"I cannot agree, that this caſe depends on the queſtion, who

(*a*) Sup. 165.—(*b*) *Heath*, *Rooke*, and *Chambre*, Juſtices, Lord *Eldon*, C. J. was abſent.

who employs the lighter. Whether it be employed by the owner of the goods, or the owner of the ſhip, the danger is the ſame, and the riſk of the inſurer ought alſo to be the ſame."—Mr. Juſtice *Chambre* ſaid,—"The argument for the defendants reſts entirely on the caſe of *Sparrow* v. *Carruthers*. I do not wiſh to ſhake the authority of that caſe; nor, indeed, is it neceſſary to do ſo: But I cannot help obſerving, that if the deciſion had been different, I ſhould have been better ſatisfied with it. The only ground upon which it can be ſupported, is, that the owner of the goods completely accepted them, and diſcharged the owner of the ſhip from any further concern in them. (*a*) But the caſe before Mr. Juſtice *Buller* (*b*) has more weight with me. In the preſent caſe, I rely on the words of the policy, and the known and ſettled uſage of the trade."

The policy affords protection in the port of delivery, only till the goods can be conveniently landed and no longer.

Though the riſk on goods, according to the uſual words of the policy, is to continue till they are diſcharged and ſafely landed at the port of delivery, this is not to be underſtood as an authority to prolong the riſk after the ſhip's arrival at her port of delivery, for any indefinite length of time, at the pleaſure of the inſured. The fair conſtruction of this clauſe is, that the goods ſhall remain under the protection of the policy for a *reaſonable time*, till they can be conveniently landed, and no longer.

A ſhip is detained on the coaſt of *Africa* before ſhe can land her goods in the regular courſe of trade, the riſk continues, if there be no unneceſſary delay.

As, where an inſurance was made from *London* to *Port Endick*, on the coaſt of *Africa*, on the ſhip till moored at anchor 24 hours, and on goods "*till diſcharged and ſafely landed.*" The ſhip arrived on the coaſt on the 6th of *May*, and was captured by the *French* on the 4th of *June*. The trade is carried on by barter on board the veſſel, and the goods afterwards ſent on ſhore in boats, and guns

Parkinſon v. *Collier*, at N. P. *Park* 314.

(*a*) If that be a ſufficient ground to ſupport the caſe of *Sparrow* v. *Carruthers*, might not the like deciſion be ſupported on the ſame ground in the preſent caſe; for, from the time the goods were put into the plaintiff's lighter, the owners of the ſhip loſt all control over them, and were therefore diſcharged from all further concern in them. But, as Mr. Juſtice *Heath* very juſtly obſerves, 'the freight and inſurance are not commenſurate.' In truth, the inſurer, in ſuch caſe, continues liable after the owners of the ſhip are diſcharged.—(*b*) *Rucker* v. *Lond. Aſſur.* Sup. 166.

gums brought back. In this caſe, the diſcharge of the cargo was not begun, the gums not having been brought down to the coaſt, but no delay was uſed.—In an action on the policy, it was contended on the part of the defendant, that by the cuſtom of this trade, the riſk on the goods, as well as on the ſhip, ended in 24 hours after her arrival on the coaſt, and that the riſk on the cargo, while on the coaſt, was protected by the homeward policy, which, in this inſtance, was at 15 guineas *per cent.* —Lord *Kenyon*, who tried the cauſe, refuſed the evidence both of the homeward policy, and of the ſuppoſed uſage, (which he had on a former occaſion admitted againſt his own opinion, and on which a new trial had been granted,) to qualify the clear and unequivocal language of the policy, which covered the riſk *till the goods were landed.* He ſaid, that if, in landing, any unneceſſary delay had been uſed, that might amount to ſomething in the nature of a deviation; but that did not appear to be the caſe in the preſent inſtance.

Yet, if the cargo be ſold, without unloading, and the vendee contract for the freight of it to another port, the inſurer is diſcharged.

Yet, where a factor, after a ſhip's arrival at her port of diſcharge, ſells the cargo on board, without unloading, and the buyer of the goods contracts for the freight of them to ſome other port; but before the ſhip breaks ground, ſhe meets with an accident and is loſt.—In this caſe, the inſurers are diſcharged; for the property being changed, and freight contracted for *de novo*, it is the ſame as if the goods had been landed. (*a*)

But the general rule may be controlled by the uſage of a particular trade.

But the following determination will ſhew that where, by the uſage of a particular trade, it is cuſtomary to keep the goods on board the ſhip even beyond the time when they might be conveniently landed, on account of the ſhip's crew being neceſſarily employed in other buſineſs, the riſk will continue till the time when, *in the courſe of that trade*, they are uſually landed.

A ſhip and goods are inſured to the coaſt of *Labrador*. The goods are left a long time on board after the

An inſurance was made on two ſhips, and on goods on board, "From *Dartmouth* to *Waterford*, and from thence to

(*a*) General treat. of trade, 78.

to the port or ports of diſcharge, on the coaſt of *Labrador*; on the *ſhips*, till moored at anchor 24 hours, and on the *goods*, *until the ſame ſhould be there diſcharged and ſafely landed.*"—The two ſhips arrived on the coaſt of *Labrador*; the one on the 22d of *June*, the other on the 14th of *July* 1778; and from the time of their arrival, the crews were employed in fiſhing, and had taken out none of their cargoes, except at leiſure hours, ſuch things as were immediately wanted. On the 13th of *Auguſt*, an *American* privateer entered the harbour, and took both veſſels.—In an action on the policy, to recover the value of the goods, the defence was, that there had been an unneceſſary delay in unloading the cargoes, and that the loſs was therefore imputable to the negligence of the inſured. On the other hand, the plaintiffs relied on the words of the policy, and the uſage of the trade, which they proved to have been for three years, to proceed in voyages of this ſort as the ſhips inſured had done. It appeared that the plaintiffs had the only warehouſes on the coaſt of *Labrador*, but that they were not ſufficient to hold the goods, if they had been landed; that, in chartering ſhips for this trade, it was uſual to ſtipulate that they ſhould have 60 days allowed for diſcharging; and that, in fact, they were ſometimes longer. That in the *Newfoundland* trade, it was uſual to keep their goods ſeveral months on board, and ſometimes even till they have part of their homeward cargo of fiſh on board; that the firſt object is to catch fiſh, and they unload only when they cannot fiſh; and that the old cargo being chiefly ſalt and proviſions, is gradually taken out as it is conſumed.—Upon this evidence the plaintiffs had a verdict.—The defendant moved for a new trial, on the ground, that the policy on the *ſhips*, having expreſſed 24 hours after their ſafe arrival as the duration of the riſk on them, no underwriter could ſuppoſe that he was to be liable for the *goods* for 50 or 60 days longer; that the fair conſtruction of the policy was, that the goods were to be protected a reaſonable time, and until they could be conveniently landed; that evidence of the uſage of

ſhip arrives at *Labrador*; but this being uſual in the fiſhing trade at that place, the riſk on the goods continues.

Noble v. *Kennoway*, *D.* 492.

of this particular trade ought not to have been admitted; and that a ſpecial clauſe might have been inſerted in the policy for protecting the ſhip and goods during her ſtay.—But the court held, that the inſurer was liable for this loſs.—Lord *Mansfield* ſaid;—"The trade of fiſhing on the banks of *Newfoundland*, eſpecially from the weſt of *England*, has been known and practiſed for many years. Since the treaty of *Paris*, a new trade has been opened to *Labrador*. The inſurance here is on the ſhips, and *the goods till landed*. The defendant ſays, the plaintiffs have been guilty of unreaſonable delay in landing them. That queſtion was to be tried by the jury, and could only be decided by knowing the uſual practice of the trade. Every underwriter is preſumed to be acquainted with the practice of the trade he inſures, whether recently eſtabliſhed or not. If he does not know it, he ought to inform himſelf. It is no matter if the uſage has only been for a year. This trade has exiſted, and has been conducted in the ſame manner for three years. It is well known that the fiſhery is the object of the voyage; and the ſame ſort of fiſhing is carried on in the ſame ſort of way at *Newfoundland*. The point is not analogous to a common law *cuſtom*; and the evidence of a uſage of a ſimilar trade at *Newfoundland* was admiſſible."

Every underwriter is preſumed to know the practice of the trade he inſures in, tho' recently eſtabliſhed.

The uſage of another ſimilar trade may be given in evidence, to ſhew the practice of a newly eſtabliſhed trade.

2. *Upon the Ship.*

UPON the ſhip, the riſk in ſome countries is made to commence from the time ſhe begins to take in her firſt goods or ballaſt, and to continue till after ſhe arrives at her place of deſtination, and is entirely diſcharged. In others, the riſk is made to end twenty-one days after the ſhip's arrival; or ſooner if ſhe be unloaded. (*a*)—In *France*, if the time of the riſk on the ſhip be not regulated by the contract, it runs from the time ſhe ſets ſail, till her arrival at her port of deſtination, and till ſhe be there anchored and moored at the quay. (*b*)

When the riſk on the ſhip begins and ends.

In *France*.

In

(*a*) 1 *Mag.* 47.—(*b*) Ord. of *Louis* XIV. tit. *Contrats à la groſſe*; art. 5. Vid. *Valin* on this art. *Pothier*, h. t. n. 63. *Emerig.* tom. 2. p. 14.

In *England*, the commencement of the risk on the ship varies in almost every case. In outward-bound voyages, it is generally made to commence from her beginning to load at her port of departure. In *England*.

Sometimes privateers on a cruise, ships engaged in the coasting trade, or in short voyages, are insured for a limited period of time; and, in such cases, the risk commences and ends with the term, wherever the ship may then happen to be.

If a ship be insured *from* the port of *London* to any other port, and before she breaks ground, an accident happen to her, the insurers are not answerable; for the risk does not commence till she sets sail on her departure from the port of *London*: But if the insurance be "*at and from*" the port of *London*, the insurers are liable for any accident that may happen to her, *from the time of subscribing the policy*. If an insurance be *from* a place, the risk does not commence till her departure from thence.

When a ship, expected to arrive at a certain place abroad, is insured "*at and from*" that place, or *from her arrival* there, the risk begins from the first moment of *her arrival at the place* specified; and the words "*first arrival*" are implied, and always understood in policies so worded. The risk in such cases continues there as long as the ship is preparing for the voyage insured: But if all thoughts of the voyage be laid aside, and the ship be suffered to lie there for a length of time, with the owner's privity, the insurer is not liable; for this would be to subject him to the whim and caprice of the owner, who might choose to let the ship lie and rot there. (*a*) In homeward voyages, where the policy is "*at and from*."

In some foreign countries, the risk on the ship is made to continue, as we have already observed, till she is entirely discharged. In others, it continues for twenty-one days after her arrival; unless she be sooner unloaded.—But in *English* policies it is usually made to continue only '*until the ship hath moored at anchor 24 hours in good safety.*'—*Magens* objects, and not without reason, that freight is not earned till the cargo is completely discharged, and as Objections to the time allowed by *English* policies.

(*a*) Per Lord Ch. *Hardwicke*, in *Mottcux* v. *Lond. Assur.* 1 *Atk.* 545. and in *Chitty* v. *Selwyn*, 2 *Atk.* 359. Vid. *Bird* v. *Appleton*, 8 T. R. 562, sup. 59.

as it is almoſt impoſſible for a ſhip to unload in ſo ſhort a time as 24 hours, the conſequence is, that the freight remains unprotected, from the expiration of the 24 hours till the ſhip is diſcharged. Therefore, ſays he, in bottomry bonds, and policies of inſurance, on ſhip and freight, there ſhould be a ſtipulation that the riſk ſhall not end till the expiration of a certain number of days after the ſhip's arrival. (*a*)

The inſurer is liable for no loſs after the time.

Where the policy contains the uſual words '*until ſhe hath moored at anchor 24 hours in good ſafety*,' the following caſe will ſhew that the inſurer is anſwerable for no loſs after the expiration of that time.

A ſhip is moored on the outſide of a tier, there being no room for her within;—after the 24 hours ſhe is driven from her anchors.—The inſurer is not liable.

A ſhip arrived in the *Thames* at the wharf where ſhe was to unload, on the 12th of *January*, and was laid on the outſide of the tier, there being no room for her on the inſide: Her ſails were unbent, her top-maſts ſtruck, three anchors out, and ſhe was laſhed to another ſhip, and ſo continued till the 19th, when ſeveral ſhips and a quantity of ice drove athwart her ſtern, forced her adrift, and ſhe was totally loſt.—In an action againſt an inſurer on this ſhip, Lord *Kenyon*, who tried the cauſe, was of opinion that ſhe was completely moored on the 12th of *January*; and as the accident did not happen till above 24 hours after that time, the inſurer was not liable for the loſs.

Angerſtein v. *Bell*, at N. P. *Park* 35.

This holds though the cauſe of the loſs exiſted before the ſhip's arrival. The maſter of a ſhip having been guilty of ſmuggling during the voyage, the ſhip is ſeized on this account after ſhe arrives and has been moored 24 hours—The inſurer is not liable, tho' the forfeiture attached the moment the offence was committed.

The following caſe ſhews that this rule holds, even where the loſs ariſes from a cauſe which exiſted antecedent to the time of the ſhip's being moored.

A ſhip was inſured from *Hamburgh* to *London*, and in the courſe of the voyage the maſter committed barratry by ſmuggling on his own account on the *Engliſh* coaſt; and for this ſmuggling, the ſhip, above three weeks after ſhe had arrived in ſafety at her moorings in the *Thames*, was ſeized by the revenue officers.—In this caſe it was determined that though, by the ſtat. 24 *G.* III. c. 47, and the other exciſe laws, the forfeiture attaches the moment the offence is committed, and the ſhip may be ſeized at any time afterwards; and though the barratry, in this caſe, was

Lockyer v. *Offley*, 1 T.R. 252 inf. c. 13, §5.

(*a*) Vid. 1 *Mag.* 23. 47. Vid. *Skin.* 243.

was committed *during* the voyage, yet the underwriters were not liable for this loſs.—Mr. Juſtice *Willes*, in delivering the opinion of the court, ſaid,—"Though the cuſtom-houſe officers might ſeize for the forfeiture within three years after the fact; and the Attorney General might file an information at any time while the ſhip was in being; is the inſurer during all this time to continue liable? Suppoſe the ſhip had gone ſeveral voyages afterwards; and ſuppoſe a partial loſs paid, and the underwriter's name ſtruck out of the policy, ſhall an action be afterwards brought upon the policy? His accounts could never be ſettled, nor could he be finally diſcharged whilſt the ſhip was in exiſtence. Such a poſition would be monſtrous, and attended with infinite inconvenience. There muſt be ſome certain reaſonable limitation in point of time laid down by the court, when the inſurer ſhall be releaſed from his reſponſibility. If he be liable for a month, he may be liable for a year, and ſo on. And we all think that the law on inſurances would be left unſettled, and in much confuſion, if any other time were ſuggeſted than that preſcribed by the policy, namely, *the continuance of the voyage, and the ſhip's mooring 24 hours in ſafety.*"

A ſhip is inſured for ſix months, during which time ſhe gets her death's wound, but ſurvives the ſix months:—The inſurer is not liable.

So, where an inſurance was made on a ſhip for *ſix months*; and three days before the expiration of that time, ſhe received her death's wound, but, by pumping, ſhe was kept afloat till three days after the time; it was determined that the riſk was at an end before the loſs happened; and that therefore the inſurers were not liable. Upon the ſame principle, if an inſurance be made on a man's life *for a year*, and ſome ſhort time before the expiration of the term, he receive a mortal wound, of which he dies, *after the year*; the inſurer is not liable.

Merretony v. *Dunlop*, E. 23 G. III. in B. R. cited by Mr. Juſtice *Willes* in *Lockyer* v. *Offley*, 1 T. R. 260.

But before the riſk on the ſhip can be ſaid to be completely ended, ſhe muſt not only have been 24 hours moored at anchor in her port of deſtination, but ſhe muſt have been during that time *in good ſafety*, in the fulleſt

But if the ſhip from neceſſity be ſent from her moorings before the 24 hours are ended, the riſk continues.

fulleſt ſenſe of thoſe words. If, therefore, the ſhip be obliged to perform quarantine, this does not end the voyage. The voyage only ends when the ſhip is arrived at her port of deſtination, and is there moored 24 hours in good ſafety.(*a*) And the following caſe will ſhew, that, if the ſhip, before the 24 hours are expired, be ordered to the proper place to perform quarantine, the riſk continues, though ſhe do not leave her moorings till long after the 24 hours are expired.

A ſhip, after being moored, but within the 24 hours, is ordered to the proper place to perform quarantine :—The riſk continues.

Waples v. *Eames*, 2 Str. 1248.

A ſhip was inſured, "At and from *Leghorn* to the "port of *London*, and till there moored 24 hours in good "ſafety."—She arrived on the 8th of *July* at *Freſh Wharf*, and moored, but was the ſame day ſerved with an order to go back to the *Hope*, to perform a fourteen days quarantine. The men upon this deſerted her, and the captain on the 12th applied to be excuſed going back, which petition was adjourned to the 28th, when he was ordered back. On the 30th ſhe went back, performed quarantine, and then ſent up for orders to air the goods, which he could not do till the 14 days were expired; but before the ſhip returned, ſhe was burnt on the 23d of *Auguſt*.—It was ruled (*b*) that though the ſhip was ſo long at her moorings, yet ſhe could not be ſaid to be there in *good ſafety*, which muſt mean the opportunity of unloading and diſcharging; whereas here ſhe was arreſted within the 24 hours, and the hands having deſerted, and government having taken time to conſider the petition, there was no default in the maſter or owners.

So, if the ſhip be ſeized at her port of delivery as prize, within the 24 hours.

The following caſe will ſhew that, upon the ſame principle, if the ſhip, on her arrival at her port of deſtination, be ſubject to ſeizure under an embargo and a declaration of repriſals, and ſhe be in fact ſeized, within the 24 hours, though ſhe be permitted afterwards to land her cargo, the inſurer is liable.

A ſhip arrives at her port of deſtination, and finds an embargo laid there, upon which ſhe is detained as prize :—The inſurers

A ſhip was inſured "from *Bilboa* to *Rouen*, and till 24 hours moored in ſafety there."—The ſhip arrived, but

(*a*) Vid. *Cleiraс*, ch. 9, art. 15.—(*b*) At N. P. probably by *Lee*, C. J.

but an embargo had been laid on all *Engliſh* veſſels in that port. The captain went on ſhore the day he arrived, and the next day the embargo was laid on his ſhip. He was afterwards permitted to land his cargo, which he delivered to his conſignees, but the ſhip was detained as prize, and the captain and crew allowed ſubſiſtence, as priſoners of war, from the time of their arrival.—In an action on the policy, it was ruled by Lord *Kenyon*, that the ſhip was as much within the power of the enemy, as if a guard had been put on board the moment ſhe arrived. She could not, therefore, be ſaid to be 24 hours, or a minute, moored in *ſafety*, as far as relates to the inſured; for immediately on entering the port ſhe was, to all intents and purpoſes, captured by the *French*.

are liable, tho' ſhe was permitted to land her cargo and deliver it to the conſignees.

Minnett v. *Anderſon*, at N. P *Peake* 211.

When the voyage inſured is deſcribed in general terms, as "*from* A. *to* B." without expreſſing how long after her arrival the inſurance is to continue; it has been holden that the riſk upon the ſhip continues till ſhe has been unloaded and diſcharged from the voyage. (*a*)—And though it ſeems reaſonable that an inſurance on the ſhip, for the voyage from *A.* to *B.* generally, ſhould continue till the object of the voyage is accompliſhed, that is, till her cargo is landed; yet, in the following caſe it was determined that an inſurance upon a ſhip to *Jamaica generally*, ends as ſoon as ſhe moors 24 hours in any port in the iſland, and does not continue till ſhe comes to her laſt port of delivery.

If the riſk on a ſhip be from *A.* to *B.* generally, it has been holden that it laſts till ſhe is unloaded and diſcharged.

Yet an inſurance to *Jamaica* generally, ends as ſoon as the ſhip has anchored 24 hours at any port there, though her cargo is to be delivered in different places.

A ſhip was inſured "From *London* to *Jamaica*" *generally*; and, by a ſubſequent policy, ſhe was alſo inſured, "*At and from Jamaica* to *London*."—The ſhip, having touched for ſome days at one port of *Jamaica*, was loſt in coaſting the iſland, but before ſhe had delivered all her outward bound cargo at the other ports of the iſland.—The ſhip was what is called a *general* ſhip; that is, ſhe was advertiſed at *Lloyd*'s coffee houſe, as

Camden v. *Cowley*, 1 *Bl.* 417 and 418.

(*a*) R. Anon. *Skin.* 243.

as bound to the iſland generally; and, by the courſe of trade, to touch at the ſeveral ports of the iſland, there to deliver ſome goods and take in others.—In an action on the *homeward policy*, in order to ſhew where the homeward riſk commenced, it was neceſſary to ſhew at what time the outward riſk determined; and after an examination of merchants as to the cuſtom, it was decided by a ſpecial jury that the underwriters on the homeward policy were liable for the loſs, being of opinion that the outward riſk ended when the ſhip had moored twenty-four hours in any port of the iſland; and did not continue till ſhe came to the laſt port of delivery.—Upon a motion for a new trial, Lord *Mansfield* ſaid that the inclination of his opinion was the contrary way. But as the cauſe had been thoroughly tried, and no new light could be thrown on it, he was againſt granting a new trial. The other judges concurred, and Mr. Juſtice *Wilmot* ſaid he was of opinion that the verdict was right, the ſhip having arrived *at Jamaica*, the firſt port ſhe came to trade in.

General inſurance on ſhip and goods to *Jamaica*. The ſhip, after diſcharging part of her cargo at one port, is chartered for another voyage, in which ſhe is to deliver the reſt at another port of the iſland.—The riſk ended on both ſhip and goods at the firſt port.

So, where an inſurance was made on the ſhip *Paliſer* and goods on board, "At and from *Georgia* to "*Jamaica*, and till moored 24 hours in ſafety."—The ſhip arrived at *Montego Bay*, where ſhe moored and remained nearly a month, and the agent of the inſured ſold, and *delivered*, the greateſt part of her cargo to merchants there. The captain then chartered the ſhip to proceed from thence to *St. Anne's*, and there take in a cargo for *London*; and it was verbally agreed that the remainder of the cargo, which was lumber, ſhould be carried *as ballaſt* to *St. Anne's*. Accordingly the ſhip, after taking in ſome ſuſtick, proceeded toward *St. Anne's*, but was loſt in her paſſage thither.—In an action on the policy, it was urged for the plaintiff, that the policy being in general terms, "to *Jamaica*," it meant to include all the ports in that iſland, at which any part of the cargo was to be delivered; and therefore, upon ſuch an inſurance, the *ſhip* may go from port to port; but at all events, the *goods* were protected by the policy *till they were all diſcharged*

Leigh v. *Mather*, at N. P. *Eſp. Rep.* 412, *Park* 38.

and

and ſafely landed.—But Lord *Kenyon*, who tried the cauſe, held clearly that the riſk on the *ſhip* ceaſed on her being moored 24 hours in the firſt port of the iſland, *for the purpoſe of unloading*:—He ſaid that, when a ſhip is inſured to any particular port of delivery, if by ſtreſs of weather ſhe be forced into a different port, and there diſcharge part of her cargo, ſhe is nevertheleſs protected by the policy till ſhe arrives at her port of delivery. But it appearing in evidence that *Montego Bay* was the original deſtination of the *cargo*, and that its not being wholly delivered there, was only prevented by the new agreement, he held that nothing could be recovered for the loſs of *goods*. For a ſhip, inſured to *Jamaica generally*, cannot be permitted to go from port to port, round the whole iſland, for the purpoſe of unloading, eſpecially where, as in this caſe, the ſame perſon is owner of both ſhip and goods.

In *France* it was uſual to inſure to the *French Weſt India* iſlands generally; and, in ſuch caſe, the riſk on *goods* continued till they were landed at their reſpective places of deſtination; and on the *ſhip*, till ſhe had diſcharged her cargo at the laſt of thoſe places.—But where the ſhip had diſcharged all but a ſmall part of her cargo, amounting to about one *per cent.* on the whole, and had begun to take in her homeward cargo, the riſk on the ſhip was conſidered as at an end, and the inſurer diſcharged. (*a*)

But they hold, that ſo long as any conſiderable part of the cargo remained on board, the riſk continues, though part of the homeward cargo be put on board.

As where an inſurance was made on a ſhip and cargo from *Bourdeaux to the French Weſt India Iſlands; with liberty to touch, ſtay, and trade at ſuch ports or places as the captain ſhould think proper.* (*b*)—The ſhip arrived at *Jaquemel*

(*a*) *Emerig.* tom. 1, p. 72.—(*b*) This, I conceive, is the meaning of the words, 'Touchant et faiſant échelle aux endroits 'que bon ſemblera au capitaine.' Vid. *Emerigon*'s explanation of this clauſe in *French* policies, vol. 2, p. 30.

Jaquemel in *St. Domingo*, and there diſpoſed of part of her cargo, and took on board 26 bales of cotton, and after a ſtay of five months, ſhe ſailed for *St. Louis*, to continue the ſale of her outward cargo, and to procure the remainder of her homeward cargo. On her paſſage thither ſhe was chaſed by three *Engliſh* privateers into a bay, where the captain landed as much of the cargo as he could, and then ſet fire to the ſhip, to prevent her falling into the hands of the enemy.—In a ſuit to recover for this loſs, the inſurers contended that as the inſured, before the loſs happened, had began to take on board their homeward cargo, this put an end to the outward voyage, and diſcharged them. On the part of the inſured it was inſiſted that the 26 bales of cotton were too inconſiderable to change the character of the voyage from outward to homeward; that there was nothing in the contract to prevent the replacing a part of the cargo, by goods of the place where the ſhip touches, and that the riſk on the ſhip continues till the outward cargo is all, or nearly all, landed.—The inſurers were condemned to pay the loſs. This ſentence was reverſed; but, upon appeal to the parliament of *Bourdeaux*, the orignal ſentence was affirmed, and the inſured recovered. (*a*)

It is obſerved by *Emerigon* on this caſe, that as the cargo was not all diſpoſed of at *Jaquemel*, the ſhip's departure for *St. Louis* ought to be looked upon as a continuance of the voyage, and upon that principle the final deciſion was right: But that it would have been otherwiſe, if, by the ſale of all, or nearly all the cargo at *Jaquemel*, the outward voyage had been ended.

The riſk on the furniture of the ſhip may continue even when put on ſhore.

In general, the riſk on the rigging, tackle, furniture, and proviſions of the ſhip inſured, continues no longer than they are attached to, or remain on board the ſhip. But the following caſe is an authority to ſhew that where it is neceſſary to put theſe articles on ſhore during a repair, and this is the uſual practice in ſuch caſes, the riſk continues on them while on ſhore, and if

(*a*) Vid. *Emerig.* tom. 2, p. 73.

if they are loſt or damaged by any of the perils mentioned in the policy, the inſured is liable.

An inſurance was made on the ſhip *Onſlow*, "At and "from *London* to any ports or places beyond the *Cape* "*of Good Hope*, and back to *London*, free from average "under 10 *per cent.*, upon the body, tackle, &c. of the "ſhip: Beginning the adventure from the date of the "policy, and to continue till the ſhip ſhall have arrived "as above, and there anchored 24 hours in good ſafety." The ſhip arrived in the river *Canton* in *China*, where ſhe was to ſtay to clean and refit, and for other purpoſes. Upon her arrival there, all her rigging and furniture were, by the Captain's orders, taken out of her, and put into a ſtorehouſe called a *Bank Saul*, built for that purpoſe on a ſand bank, in the river, near *Bank Saul* Iſland, in order to be there repaired, and preſerved till the ſhip ſhould be heeled, cleaned, and refitted. Soon after, a fire broke out in the *Bank Saul* belonging to a *Swediſh* ſhip, which communicated to that belonging to the *Onſlow*, and conſumed it, together with her rigging and furniture. It appeared to be the univerſal uſage for many years, for *European* ſhips, when they arrive near this *Bank Saul Iſland*, to unrig and depoſit their rigging and furniture in a *Bank Saul*, in the manner above-mentioned: And this is for the benefit of all perſons concerned in the ſafety of the ſhip. The ſhip having been again rigged, and put into the beſt condition the place would permit, arrived in the *Thames*.—Upon this caſe it was inſiſted on the part of the defendant, that though the inſurer was liable for all loſſes *during the courſe of the voyage*, yet that this liability was confined to loſſes *at ſea* only; whereas this was a loſs on ſhore. But the court determined, after great conſideration, that the loſs on the *Bank Saul* was a loſs within the words, intent, and meaning of the policy.—Lord *Mansfield*, in delivering the opinion of the court, ſaid,—"The tackle, apparel, and furniture, of the ſhip, were inſured expreſsly from fire during the voyage, and until her return to *London*. Theſe being deſtroyed by fire, during the voyage, and before her return, is a loſs within the general words of the

The rigging and tackle of a ſhip are put on ſhore during a repair in the uſual courſe of the voyage, and are burnt by accident.—This is a loſs within the policy.

Pelly v. *Roy. Ex. Aſſur.* 1 *Bur.* 341.

If a loſs be within the *general words* of the policy, it is incumbent on the inſurer to ſhew that it aroſe from a peril not inſured againſt.

the policy; and it was therefore incumbent on the defendants to ſhew, from the manner in which it happened, that it aroſe from a peril againſt which they did not inſure. But the inſurer, in eſtimating the premium, muſt have conſidered the uſual courſe of the voyage, and deſcribing the voyage in the policy is an expreſs reference to the uſual manner of making it, as much as if every circumſtance were mentioned. The only objection was, that the loſs happened on *land*, and not in the ſhip, or on the water. To this the obvious anſwer is, that neither the words, nor the intent, of the policy make ſuch diſtinction."

Deſcribing the voyage in the policies is an expreſs reference to all the circumſtances attending it.

So, in a ſimilar caſe, where the ſhip's *proviſions* were landed and put into a *Bank Saul*, and there deſtroyed by an accidental fire, the queſtion was, whether thoſe proviſions were covered by the policy; but it was admitted that, if they were, it was to be conſidered in the ſame light as if the accident had happened *on board the ſhip*.

Such a loſs is to be conſidered in the ſame light as if it had happened on board the ſhip.

Brough v. *Whitmore*, 4 T. R. 206.

Every underwriter is preſumed to be fully converſant in the uſual courſe of the trade on which he becomes an inſurer; and therefore, if he does not know it, he ought to inform himſelf, becauſe he will be bound by the uſage of ſuch trade, as much as if it were particularly inſerted in the policy. This rule has been already exemplified in the caſe of *Noble* v. *Kennoway*, (*a*) and it is particularly to be attended to by underwriters upon *Eaſt India* voyages, the policies on which are ſo unlimited, as to time and place, that they include the country voyage there, and all riſks that may be run in conſequence of any new agreement made in *India* to prolong the time mentioned in the charter party; nor is it neceſſary to inform the underwriters of ſuch new agreement; as that, and all other neceſſary information on the ſubject, may readily be had at the *India Houſe*. This will appear by the following deciſions on inſurances of this ſort.

Every underwriter is preſumed to be acquainted with the courſe of the trade on which he becomes an inſurer.

An inſurance was made on a ſhip, "At and from "*Bengal*, to any ports or places in the *Eaſt-Indies*, *China*, "*Perſia*

An inſurance upon an *India* voyage includes the riſk

(*a*) Sup. 171.

"*Perſia*, or elſewhere beyond the *Cape of Good Hope*, for-"wards and backwards, and during her ſtay at each "place, until her arrival at *London*."—In an action on this policy, tried before Lord *Mansfield*, it appeared in evidence that the charter-party was in the uſual printed form, containing a clauſe empowering the company's ſervants in *India* to detain the ſhip for any time they pleaſed, not exceeding a year from the time to which ſhe was chartered. That the ſhip ſailed on the 25th of *March* 1762, arrived at *Bombay* the 19th of *September*; left *Bombay* the 4th of *November*; arrived at *Calcutta* the 5th of *March* 1763.—On the 28th the preſident and council entered into a new agreement with the captain, reciting that the charter-party would expire on the 11th of *February* 1764, but that it was expedient to detain the ſhip in *India*; and the captain, by that agreement, lets the ſhip for a year from that day.—In *July* 1763, the ſhip arrived a ſecond time at *Bombay*; ſailed for *Bengal* in *December*; arrived there early in 1764; ſailed again for *Bombay* the 19th of *March*, and on the 21ſt was loſt.—On the 3d of *April* 1764, the owner received a letter from the captain dated the 14th of *April* 1763, with a copy of the new agreement, which was publickly read in a coffee-houſe. The next day ſome inſurances were made by the owner, and on the 17th of *July*, other inſurances were made: All which were made after this letter was publickly read.—It was further proved that it was very common in this trade to detain ſhips for a year by a new agreement, which was very beneficial to the owners; to which uſage the words of the policy are adapted, being without limitation of time or place, and without any reference to the firſt voyage: That all this might have been learned at the *India Houſe*: But at the time of the underwriting, no mention was made, or queſtion aſked, when the ſhip ſailed, or when ſhe arrived, or whether ſhe was continued for a year according to the proviſo in the charter-party; and none of the underwriters deſired *to be off*, after they knew of the new agreement to prolong the ſhip's ſtay.—The defence ſet up by

of the country voyage by the uſage of the trade.

Salvador v. *Hopkins*, 3 *Bur.* 1707.

The following case shews that, even where the liberty is only '*to touch and stay*,' yet, by the usage of the trade, intermediate voyages are covered by the insurance.

In a like policy, the liberty was only to *touch and stay* at any port, &c. in the voyage:—By the usage of the trade, this covered the risk on the intermediate voyages.

A ship was insured, "At and from *London* to *Madras* "and *Bengal*, beginning the risk upon the said ship, at "*London*, and so to continue till the arrival of the said "ship at *Madras* and *Bengal*, with liberty *to touch and* "*stay at any port or place* in the voyage."—The ship arrived at *Madras*, where, by an order of council, she was unloaded, and sent for rice to *Visagapatnam*, and her voyage to *Bengal* was postponed. She was afterwards sent to *Bengal* in ballast, and was taken in her passage.—In an action on the policy, Lord *Mansfield*, at the trial thought that the words of the policy would not admit of such a latitude of construction, as to take in the intermediate voyage, the words being much narrower than those in the last case; and the plaintiff was nonsuited. But this nonsuit was afterwards set aside, the court being clearly of opinion that the risk continued during the intermediate voyages.—Lord *Mansfield* said,—"This being a policy on the ship on an *India* voyage, and the usage, as to the intermediate voyages, being notorious to all parties, the contract must be considered as referring to it. This usage is that, when the ships arrive at *Madras*, the council may send them elsewhere."

Farquarson v. *Hunter*, B. R. Hil. 25 *G.* III. MS. S.C. *Park* 50.

But though, by the well known usage of any particular trade carried on by this country, a voyage is sometimes covered by the policy, which is not within the express words of it; yet, the general rule is, that a liberty '*to touch at any ports or places*' means only places in the usual course of the voyage; and this general rule must be considered as applicable to voyages undertaken by the ships of foreign nations, unless the usage of the particular trade in which they are engaged be made known to *British* underwriters, who cannot be presumed to be conusant of such usage.

But the general rule is, that a liberty to touch and stay at any ports and places, means only places in the usual course of the voyage.

Thus:—An insurance was made, "At and from "*Port L'Orient* to *Pondicherry*, *Madras*, and *China*, and "at and from thence back to the ship's port or ports of

An insurance of a *French* ship upon a voyage to *Pondicherry* & *China*, with liberty to touch

"of discharge in *France*, with liberty to touch in the *out-*
"*ward or homeward bound voyage*, at the Isles of *France*,
"*Bourbon*, and at all or any other place or places where-
"soever." There was also a clause in the policy, "That
"the ship, *in this voyage*, might proceed to, and touch
"and stay at, any ports or places, as well on this side,
"as on the other side of the *Cape of Good Hope*, without
"its being deemed a deviation." The ship arrived at *Pondicherry*, and, after remaining there a month, sailed for *Bengal* instead of going to *China*. Having wintered, and undergone a repair there, she returned to *Pondicherry*. Both in going and returning she touched and took in goods at, or lay off, several places; and so prolonged her voyage to and from *Bengal* much beyond the usual time. Having taken in her homeward cargo at *Pondicherry*, she proceeded on her voyage back to *L'Orient*, but was taken by an *English* privateer. In an action on this policy, one question was, whether the voyage to *Bengal* was insured by the policy, under the general liberty to touch and stay *at any ports or places?*—Upon this point Lord *Mansfield*, who tried the cause, held clearly that those general words were, by the expressions "out-
"ward and homeward bound voyages," and "in this
"voyage," qualified and restrained so as to mean only places, *in the usual course of the voyage*, to and from the places mentioned in the policy. (*a*)

and stay at ports & places, &c. will not cover a voyage to *Bengal*.—A liberty to touch and stay at any ports & places, means ports and places in the usual course of the voyage.

Lewabree v. Wilson, Doug. 271.

A liberty to *touch and stay* at any ports or places does not authorize the insured to *trade* at any of those places. Thus:—A ship was insured from *Whitehaven* to *St. Michael's*, and from thence to her port or ports of discharge in the *Channel*, "with liberty to touch and stay
"at any port or ports on her passage out."—The ship by stress of weather put into the port of *Dublin*, where she continued three weeks, and there broke bulk and sold a quantity of coals with which she was partly freighted.—Upon this coming out in evidence, Lord *Kenyon* said, that the plaintiff could not recover under this policy, because the liberty to touch and stay at any port, could never

A liberty to *touch and stay* does not authorize the insured to break bulk and trade.

Stitt v. Wardell, at N. P. Disp. Rep. 610.

(*a*) Vid. this case cited more at large, inf. ch. 12, § 1.

never be extended to give the insured a liberty of *trading* at such port; for that would be to make the underwriters insure a voyage not in their contemplation.

The risk may be properly commenced, though under circumstances unforeseen at the time of the contract.

If the voyage described in the policy has really been commenced, though at a time, and under circumstances very different from those which were in the contemplation of the parties at the time when the policy was effected; yet, if there be no fraud, misrepresentation, or concealment on the part of the insured, this shall be a good commencement of the risk.

A ship is insured from *A.* to *B.* being represented as a specific part of a voyage from *B.* to *C.* from thence to *A.* & back to *B.* The ship having sailed to *C* is unavoidably obliged to return to *B.* from whence she sails to *A.* and is captured on her voyage back from thence to *B.*—The insurer is liable for this loss, though the original voyage, of which the voyage insured was a part, was not performed. And the sailing from *A.* for *B.* was a good commencement of the voyage insured.

Thus:—The ship *Timandra* having sailed from *Lisbon* on a voyage to *Madeira*, and from thence to *Saffi*, on the coast of *Africa*, and back from thence to *Lisbon*, the plaintiff directed his broker to make three insurances, viz. one on three-fourths of the ship, for the round voyage, one on three-fourths of the freight, on the voyage from *Lisbon* to *Madeira*, and one, (which was the insurance in question,) on three-fourths of the freight "from *Saffi* to *Lisbon*."—The two former were effected without any difficulty; but the broker was not able to get the third underwritten at the same time, on account of the distant period at which the risk was to commence: However, on a representation some time afterwards, that he had received intelligence of the ship's arrival at *Madeira*, and that she was about to proceed on her voyage immediately, this also was effected.—An action being brought on this policy for a loss by capture, the defendant paid the premium into court, insisting that the voyage insured had never been commenced.—Upon the trial of the cause, it appeared that when the ship arrived at *Madeira*, all the crew except two, being alarmed by reports of some *Moorish* cruisers being off *Saffi*, and their having captured and ill-treated a *Dane* and an *American*, quitted the ship, and refused to return to her, unless the captain would promise to sail immediately back for *Lisbon*. Under these circumstances the captain carried the ship back to *Lisbon*; but on his arrival there, the charterers insisted on his proceeding directly from thence to *Saffi*, which he accordingly did, and was captured on his return from

Bristol v. *Passmore*, 1. *Pul.* & *Bos.* 200.

from *Saffi* to *Liſbon*. It was in evidence that the difference of ſeaſon, ariſing from this delay, did not vary the riſk.—The jury found a verdict for the plaintiff, and upon a motion for a new trial, it was contended on the part of the defendant, 1ſt, That where a voyage is inſured from *A.* to *B.*, it muſt appear either that the ſhip is at *A.* at the time of the inſurance, or how and when ſhe is to arrive there; otherwiſe it would be an indefinite inſurance on the firſt voyage which the ſhip ſhould make from *A.* to *B.* with the ſame maſter, and the other requiſites of the policy: That if it be ſtated whether the ſhip be at *A.* or when ſhe will be there, this becomes an ingredient in the riſk inſured; and this ſeemed to have been the underſtanding of the underwriters, when they refuſed to inſure till they were informed of the ſhip's arrival at *Madeira*; and conſequently, as the ſhip, inſtead of proceeding to *Saffi*, had returned to *Liſbon*, the voyage inſured was abandoned; or rather, as the previous part was abandoned, the voyage inſured never commenced. 2dly, That this was not an inſurance on any voyage which the ſhip might make from *Saffi* to *Liſbon*; but on a voyage from *Saffi* to *Liſbon*, being part of a voyage, already commenced, from *Liſbon* to *Madeira*, from thence to *Saffi*, and from *Saffi* back to *Liſbon*; and that the repreſentation of this to the underwriters was the ſame in this caſe as a warranty, inaſmuch as there was a ſubſtantial deviation from it. That the voyage undertaken at the inſtance of the charterer was a new voyage; and that no recommencement of what had once been abandoned, could make the underwriter liable.—The court determined, however, that the plaintiff was entitled to recover.—Lord C. J. *Eyre* ſaid,—"It is admitted, that this is a new caſe, and there are no authorities on the ſubject. It has been argued on the part of the defendant, that the voyage inſured was the third branch of a voyage ſpecifically deſcribed in the policy; but I take the voyage inſured to have been a voyage from *Saffi* to *Liſbon* only. Now, that the voyage deſcribed did literally commence, there can be doubt, and I know of no

no way in which that voyage could be restricted in point of commencement or connexion with any other voyage, but by representation or warranty. If a man be asked to underwrite a voyage from *Saffi* to *Lisbon*, he naturally inquires what this voyage is, and at what time it will commence, that he may judge of the risk. He will expect a representation, and that representation ought to be true. Here the representation was, that the ship was bound from *Lisbon* to *Madeira*, from thence to *Saffi*, and from *Saffi* to *Lisbon*. That representation was true at the time it was made, and the underwriter was to form his own calculation of the time when the ship would arrive at *Saffi*. If the insurance be made on a representation which is true at the time, it would be difficult to state a case, where subsequent events, not happening through misconduct, and not totally disappointing the voyage, would discharge the underwriter. In this case the underwriter formed his judgment of the risk, knowing that all was executory, and that an alteration might arise that might increase the risk. He underwrote upon the representation made to him. A circumstance occurred under which the captain was at a loss how to act. He resolved to go back to *Lisbon*, and there the charterer required him to fulfil his engagement. He sailed accordingly, and arrived at *Saffi*; and in the course of his voyage home was captured. Then, why are not the underwriters liable? They were literally bound to insure a voyage from *Saffi* to *Lisbon*; tied up, indeed, as far as a representation of the projected voyage, executory in its nature, and true at the time, could tie it up.—The voyage from *Saffi* to *Lisbon* might have been performed with as much ease after the circuitous voyage had taken place, unless a *Spanish* war had broken out, as in the direct course originally performed, from which the ship was diverted, by circumstances for which no one was to blame."

Tho' the ship, through necessity, change the order of the places at which she is to touch,

Though the ship, in this case, being under the necessity of changing the order of the places to which she was insured, yet as she did not abandon the original voyage, but

but in fact ſailed from *Liſbon* to *Saffi*, in order to perform her engagement with the charterers, the riſk continued, and the underwriters on the *whole voyage* remained liable.

Therefore, in an action on the policy, on the ſame ſhip *for the round voyage*, from *Liſbon* to *Madeira*, from thence to *Saffi* and back to *Liſbon*, the ſame facts appeared upon the trial as in the former caſe, with the addition of a letter, dated the 18th of *Auguſt*, at *Liſbon*, from the plaintiff after her return from *Madeira*, to his broker in *London*, containing this paſſage,—"Should the "merchant here who chartered the veſſel, inſiſt on her "proceeding to *Saffi* to fulfil the charter, I want to know "if it be agreeable to the underwriters that the veſſel "may proceed to complete her voyage, as by recent ac- "counts the riſk is not ſo great. I expect your imme- "diate anſwer reſpecting their determination on this "buſineſs. I hope they will be ſatisfied that the return "of the veſſel to this port, is much more in favour of "them than of me, or of any other perſon concerned. "By the next packet that ſails from hence, I ſhall be "able to inform you whether ſhe is to proceed to *Saffi* "or not; but the opinion of the underwriters one way "or the other is neceſſary." The broker, in anſwer to this letter, gave it as *his* opinion, that the policy on the round voyage was at an end, and informed the plaintiff that he had effected a new policy on the voyage from *Saffi* to *Liſbon*.—The jury found for the plaintiff.—The defendant moved for a new trial, contending, that although the deviation made by returning to *Liſbon* might poſſibly be juſtified by neceſſity, ſtill it appeared by the plaintiff's letter, that the original object of the voyage had not been kept conſtantly in view; for it long depended on the will of the charterer, whether the veſſel ſhould proceed or not; and the plaintiff himſelf was manifeſtly deſirous of abandoning the voyage.—The court determined that the verdict was right, being of opinion, that the plaintiff, although he acted with great prudence and circumſpection, had never abandoned the original voyage, but

yet if ſhe do not abandon the original voyage, the riſk continues.

The ſhip is inſured on the *round voyage*, mentioned in the laſt caſe. The captain, on his arrival at *B.* writes to his broker to know whether the underwriters will ſtill conſider themſelves liable, if the charterer ſhould inſiſt on his proceeding to *A.* and is anſwered by the broker that in *his* opinion the policy is at an end. At the inſtance of the charterer, the ſhip proceeds to *A.* and on her return from thence is captured:—The inſurer is liable, the deviation being juſtified by neceſſity, and the original voyage never having been abandoned.

Driſcol v. *Bovil*, 2 *Pul.* and *Baſ.* 313.

but conſidered himſelf liable to continue it, ſhould the charterer inſiſt on it.

3. *Upon Freight.*

Upon *freight*, the riſk does not commence till the goods are put on board.

In an inſurance upon *freight*, the riſk generally begins from the time the goods are put on board. If an accident happen to the ſhip before any goods are put on board, which prevents her from ſailing, the inſured cannot recover for the loſs of freight, which the ſhip *might* have earned if the accident had not happened.

An inſurance is on freight, & a cargo is ready to be put on board, but the ſhip is loſt while preparing for the voyage.—The inſurer is not liable, the riſk never having commenced.

Thus:—An inſurance was made "on ſhip and freight, "at and from *Jamaica* to *Briſtol*." A cargo was ready to be put on board; but while the ſhip was careening for the voyage, a ſudden tempeſt aroſe, and ſhe was loſt.—In an action on the policy, the defendant paid the loſs *upon the ſhip* into court. But the plaintiff inſiſted on the loſs of the *freight* the ſhip *would have earned*, if the accident had not happened.—But Lord C. J. *Lee* ruled, that as the goods were not actually on board, ſo as to make the plaintiff's right of freight *commence*, he could not be allowed it.

Tonge v. *Watts*, at N. P. 2 *Str.* 1251.

But if part be ſhipped, the inſured, upon a valued policy, may recover for the whole freight.

But, in the following caſe it appears, that if part of the cargo be put on board, and the reſt be ready to be ſhipped, the inſured may recover for the whole freight, upon a valued policy.

Part is ſhipped and the reſt ready to be ſhipped; but the ſhip is loſt: On a valued policy the inſured ſhall recover for the whole freight.

An inſurance was made on freight, valued at 1500 l. The ſhip was driven from her moorings and loſt, when only freight to the amount of 500 l. was on board, though goods to the amount of the reſt of the freight were, at the time, lying on the quay, ready to be ſhipped.—In an action on this policy, Lord *Kenyon*, who tried the cauſe, left it to the jury to conſider, whether this was a mere colourable inſurance, and a gaming policy, or a *bonâ fide* tranſaction: If the latter, he was of opinion, that the inſured was entitled to recover for the whole value in the policy. The jury accordingly found the whole ſum. The defendant's counſel obtained a rule for a new trial, which he afterwards abandoned, the court being ſtrongly of opinion againſt him.

Montgomery v. *Egginton*, 3 T. R. 362.

But

But though the commencement of the risk on freight is, in general, from the taking of the goods on board; yet, the following case will shew, that where the ship is to sail to a distant place to take in her cargo, the risk commences on the freight from the time of her sailing for that place.

If the ship be lost on her way to her port of loading, the insurer is liable for the whole freight.

A ship was chartered, "To depart from the *Thames* "and proceed to *Teneriffe*, and there to receive on "board from the freighters, 500 pipes of wine, to "be delivered in the *West Indies*."—A valued policy was effected on half the freight, "At and from *London* to "*Teneriffe*, and from thence to any of the *West India* "Islands, *Jamaica* excepted; and at and from thence to "the *Bay of Honduras*."—The ship was taken on her voyage to *Teneriffe*.—In an action on this policy, it was determined, that, as the charter-party was an entire contract, and as the ship's departure from the *Thames* was an inception of that contract, an inchoate right to freight commenced upon her departure, which was an insurable interest. And as the loss of the ship necessarily induced the loss of the freight, the insured had a right to recover for that loss upon this policy, which was an insurance on the freight. That this case was distinguishable from that of *Tonge* v. *Watts*, (*a*) where the inception of the risk would have been the taking of the goods on board; and that it was as great an interest as the profits expected to arise from a cargo of molasses, which, in the case of *Grant* v. *Parkinson*, (*b*) was held to be an insurable interest.

A ship sails from *London* to *Teneriffe*, to take in a cargo for the *West Indies*, and is lost in that voyage:—the insurers on freight are liable.

Thompson v. *Taylor*, 6 T. R. 478.

Sect. 6.

Whether the Risk may be changed.

Changing the nature of the risk after the policy is effected, determines the contract.

IF, after the insurance is effected, any thing be done by the insured to alter the nature of the risk, this must be done with the consent of the insurers, otherwise it will avoid the contract: As if, after a policy is effected on a merchant ship, letters of marque be put on board, and from a mere private trader, she is changed into a ship

(*a*) 2 *Str.* 1251, sup. 192.—(*b*) Sup. 111.

ſhip of war, with power not only to defend herſelf, but alſo to cruiſe and take prizes: This is ſuch an alteration of the condition of the ſhip, that the riſk muſt be materially changed from that which the underwriter took upon himſelf, and conſequently the contract is thereby determined.

A ſhip, inſured as a private trader, afterwards takes letters of marque, without the conſent of the underwriters: —This diſcharges the underwriters, tho' no uſe be made of the letters of marque.

Deniſon v. *Modigliani*, 5 T.R. 580.

As where a ſhip and cargo were inſured on a voyage "from *Liverpool* to *Oporto*:"—The ſhip ſailed but was driven back by contrary winds. She was then detained ſome time by an embargo, and before this was taken off, a war with *France* having broken out, the inſured were deſirous of putting guns on board, and taking out letters of marque for her: But fearing that this might vacate the policy, they aſked permiſſion of the underwriters, who agreed to their putting guns on board; but peremptorily refuſed to permit her to take letters of marque. Notwithſtanding this refuſal, ſhe was furniſhed with letters of marque, and after waiting ſome time for them, ſailed on her voyage, and was taken by a *French* privateer.—In an action on the policy, it was inſiſted on the part of the underwriters, that the ſhip, having ſailed with letters of marque againſt their conſent, the riſk was altered, and the policy thereby vacated. —The inſured, on the other hand, ſaid that the letters of marque were not intended to be uſed in the *voyage inſured*, but only in the *voyage home*; and that, in fact, the ſhip had not deviated in any reſpect.—The jury, being ſatisfied of this, found a verdict for the plaintiff.—But the court upon motion, ſet this verdict aſide, and determined, that a ſhip, inſured as a private trader, had no right to carry letters of marque, without the conſent of the underwriters: For they afford a ſtrong temptation to the captain to deviate in queſt of prize, and eſſentially alter the condition of the ſhip from that of a mere private trader, which materially varies the nature of the riſk, and conſequently diſcharges the underwriters.

Obſervations on this caſe.

The only ground upon which this deciſion can be at all ſuſtained, is, that the letters of marque being on board afforded a temptation to the captain to deviate from the voyage inſured in queſt of prize. It is now a ſettled point, that an *intention* to deviate, not carried into effect, does

does not avoid the policy. Still leſs, I ſhould conceive, ought a *temptation* to deviate, which may or may not produce even an *intention* to deviate, to affect the policy. It was found by the jury, in this caſe, that the letters of marque were taken on board, not for the purpoſe of being uſed in the outward voyage, but only in the homeward, which was not the voyage inſured; and that, in fact, the ſhip did not deviate.—In the following caſe, the ſame court determined, that the having letters of marque on board, but without the proper certificate of clearance, without which the captain was unable to make any *legal* uſe of them, did not vacate the policy. This deciſion, it may be preſumed, proceeded on the idea that the having theſe defective letters of marque on board afforded no temptation to the captain to deviate in queſt of prize; and yet it will be ſeen, that the plaintiff recovered in that caſe, for a loſs by barratry, in conſequence of the captain's having cruiſed in queſt of prize, under colour of the defective letters of marque. The diſtinction ſeems to be, between the letters of marque which afford a legal, and thoſe which afford an illegal, temptation to cruiſe. If we were permitted, however, to judge by the event, we might conclude that thoſe of the latter deſcription afforded the ſtrongeſt temptation.

The caſe alluded to was an inſurance made on goods, "From the *Bahama Iſlands* to *Liverpool*," on board a ſhip which had been chartered for a trading voyage from *Liverpool* to the *Bahamas*, and back.—The ſhip, about the middle of *May* 1793, having completed her lading, and having taken in guns and ammunition, for the purpoſe of defence, was ready to ſail, but wanted ſeamen. The inſured could procure none to enter, on account of a notion prevailing among them, that the enemy had threatened to treat as pirates the crews of every veſſel which made any reſiſtance, unleſs ſhe had letters of marque, and they knew that this ſhip had guns on board for the purpoſe of defence, but no letters of marque. The time preſſing much for the departure of the veſſel, the inſured, in order to quiet the apprehenſions of the ſeamen, and to induce

Letters of marque were taken out, but without the proper certificate, and only to entice ſeamen to enter, without any intention of cruiſing:—This did not vary the riſk, ſo as to avoid the policy, even tho' the captain, againſt his inſtructions, cruiſed and took prizes.

Moſs v. *Byrom*, 6 T. R. 379.

induce them to enter, procured letters of marque, *but without any intention to make uſe of them for the purpoſe of cruiſing or making repriſals.* No certificate of clearance was taken out, in purſuance of the ſtat. 38 *G.* III. *c.* 66, § 15, without which the letters of marque are declared void; and the captain ſubjected to a penalty for departing without it; and it was a part of the written inſtructions to the captain, before he ſailed, to proceed to *Liverpool* with all expedition, agreeably to the charter-party, and no mention was made of the letters of marque. A few days after the veſſel ſailed, the captain intimated an intention to cruiſe for prizes, to which ſome of the crew objected, as not being within the ſcope of their engagement; the majority, however, agreed to it, and they ſoon fell in with an *American*, whom they plundered, and afterwards releaſed. They then cruiſed for ſome days longer, out of the courſe of the voyage, and captured a veſſel of the enemy, which the captain ſent into *Bermudas*, and followed there himſelf, where he libelled his prize in the court of admiralty, in the name of himſelf and his owner; and ſhortly after, during his ſtay there, his ſhip was driven aſhore in a ſtorm, and the cargo loſt. He directed that no mention ſhould be made in the log-book of his cruiſing for prize.—In an action on the policy, the jury found for the inſured, as for a loſs by the *barratry of the maſter.*—The court was moved to ſet this verdict aſide; 1ſt, becauſe this was not barratry, inaſmuch as the act of the captain was done with a view to benefit, not to prejudice his owner; 2dly, becauſe the taking of letters of marque, without the knowledge or conſent of the underwriters, varied the riſk, and avoided the policy; and for this, the above caſe of *Deniſon* v. *Modigliani* was relied on as a clear authority in point. And it was argued, that though the inſured inſtructed the captain not to uſe the letters of marque, yet it was plain that they did vary the riſk, becauſe in fact they tempted him to do what he did. That it was true the ſame objection had been overruled in *Deniſon* v. *Modigliani*; but the preſent was a ſtronger caſe, becauſe the captain

captain did give way to temptation, and made uſe of the power which the inſured put into his hands; whereas, in that caſe, the captain did not act under the letters of marque, but the bare poſſeſſion of them was held ſufficient to vacate the policy. But, at any rate, the policy was avoided before any barratrous act committed, by the ſingle act of the captain's going out of his way to ſtop the *American* ſhip.—But the court determined that the inſured were entitled to recover on the ground of barratry. That the ſtopping and plundering the *American* ſhip was of itſelf an act of barratry in the maſter, independent of his taking the prize, being contrary to his duty to his owners, and to their prejudice; becauſe they had ſtipulated, by the charter-party, that the ſhip ſhould ſail directly to *Liverpool*, and were therefore liable for any damage that might happen in conſequence of that deviation. And though the captain might conceive that what he did was for the benefit of the owners, yet if he acted contrary to his duty to them, it was barratry.—Lord *Kenyon* ſaid, that the principles on which the caſe of *Deniſon* v. *Modigliani* was decided, were new and went to the extreme verge; yet, that the preſent caſe was diſtinguiſhable from that, where there were *legal* letters of marque to enable the captain to take prizes; but here the letters of marque were not obtained for the purpoſe of enabling the ſhip to cruiſe, but to procure ſeamen; and when they were procured, they could have no legal effect, and then it was the ſame as if no letters of marque had been on board.

CHAP.

CHAP. VII.

Of the Policy.

HAVING, in the foregoing chapters, ſhewn who may be parties to this contract, what may be the ſubject matter of it, upon what intereſt, and againſt what riſks, it may be made, we will now proceed to ſhew how, and in what form, the contract itſelf ſhall be made.

This contract is uſually compounded of the common policy, with certain ſtipulations or warranties, which are occaſionally inſerted in it, purſuant to the agreement of the parties, and of extrinſic repreſentations.

For the ſake of perſpicuity, we will examine each of theſe in a ſeparate chapter; beginning with the policy. Under this head, we will conſider,

1. The nature and properties of the policy;
2. How, and by whom, it may be effected;
3. The form and requiſites of it;
4. In what caſes it may be altered or corrected.

Sect. 1.

Of the Nature and different Sorts of Policies.

A policy what.

The policy is a written inſtrument, by which the contract of inſurance is effected and reduced into form.—The term, policy of inſurance, or *aſſurance*, as it is ſometimes called, is derived from the *Italian*, *polizza di aſſecurazione*, or *di ſecuranza*, or *di ſecurta*, and in that language ſignifies a *note* or *bill of ſecurity*, or indemnity.

It is ſigned only by the inſurers.

As the premium, which is the conſideration of the promiſe made by the inſurer, is paid, or ſuppoſed to be paid, at the time the policy is ſubſcribed, the contract contains nothing in nature of a counter-promiſe, to be performed by the inſured. In general, therefore, it contains

tains only the contract on the part of the insurers, and is signed only by them.

Policies, with reference to the *reality of the interest* of the insured, are distinguished into *interest*, and *wager* policies. With reference to the *amount* of the interest, they are distinguished into *open* and *valued*. Different sorts of policies.

An *interest policy* is where the insured has a real, substantial, assignable, interest in the thing insured; in which case only it is a contract of indemnity. Interest policy.

A *wager policy* is a pretended insurance, founded on an ideal risk, where the insured has no interest in the thing insured, and can therefore sustain no loss by the happening of any of the misfortunes insured against. Insurances of this sort are usually expressed by the words, "*interest or no interest*," or, "*without further proof of interest* than the policy," or, "*without benefit of salvage to the* insurer." Wager policy.

An *open policy* is where the amount of the interest of the insured is not fixed by the policy; but is left to be ascertained by the insured, in case a loss should happen. Open policy.

A *valued policy* is where a value has been set on the ship or goods insured, and that value inserted in the policy in nature of liquidated damages, to save the necessity of proving it, in case of a total loss: For, by allowing the value to be thus inserted in the policy, the insurer agrees that it shall be taken as there stated.—This value is, or ought to be, the real value of the ship, or the prime cost of the goods, at the time of effecting the policy.(*a*) Valued policy.

There may be many cases, however, in which an insured may have an interest in the thing insured, but the amount of which, it may be difficult or impossible for him to ascertain at the time when it is necessary to insure: As where *returns* are expected from abroad, the exact value, and even the nature of which are uncertain; so, in the case of a *prize*, where the real value of it can only be ascertained when it is brought into port and sold; and in

(*a*) 2 *Bur.* 1171.

in every inſtance where the owners have been prevented from receiving regular or ſatisfactory advices. In theſe and ſimilar caſes, the inſured muſt put a value upon the things inſured in the beſt manner he can, according to his means of judging of it; and in ſuch caſes it ſeems proper, and is become cuſtomary, to inſert a clauſe of valuation in the policy, which ſpecifies a given ſum as the value of the intereſt of the inſured.—Thus: "*In caſe of "loſs the ſaid ſhip is valued at* 2000*l. and the ſaid goods at "* 5000*l.*;"—Or, it eſtimates the value as equal to the ſums ſubſcribed. Thus:—"*The ſaid ſhip, goods, &c. val-"ued at the ſum inſured.*"

The value in ſuch policy ſhould be only the prime coſt.

The only effect of the valuation is, that it fixes the amount of the intereſt in the ſame manner as if the inſurer were to admit it at a trial; and for every purpoſe it muſt be taken, that the value was fixed ſo as that the inſured might have an indemnity only, and no more.—If it be undervalued, the merchant himſelf runs the riſk of the deficiency. If it be much over-valued, it muſt be with a bad view; either to a fraudulent loſs, or to game contrary to the ſtat. 19 *G.* II. c. 37.(*a*)

Upon a valued policy, the inſured needs only to prove *ſome intereſt*, the amount being admitted.

The value in the policy, being always conſidered as the fair amount of the prime coſt, the inſured needs only to prove *ſome intereſt*, to take it out of the ſtatute, becauſe the inſurer has admitted the amount; and if more were required, the agreed valuation would ſignify nothing. (*b*) —And though it is ſaid, in the caſe of *Harman* v. *Vanhatton*, (*c*) that the law allows a man, having *ſome* intereſt in a ſhip or cargo, to inſure more, or *five times as much*, becauſe a merchant cannot tell how much, or how little,

(*a*) Per Lord *Manſfield* in *Lewis* v. *Rucker*, 2 *Bur.* 1171. —(*b*) Per Lord *Manſfield*, ib.—*Magens*, who ſeems to have written his eſſay on inſurances before the ſtat. 19 *G.* II. c. 37. though it was publiſhed after, ſays, that in the caſe of a valued policy, the inſured has nothing to prove, "*ſave that the goods valued were put on board.*"—Vid. 1 *Mag.* 28, 35. If this was the practice, while inſurances without intereſt were ſuppoſed to be legal, how much more neceſſary to be obſerved now that they are declared by ſtatute to be illegal, and are known to be highly detrimental to commerce.—(*c*) Sup. 101.

little, his factor may have in readiness to lade on board his ship: Yet it is not said, that in case of loss, the insured might recover more than the amount of the real interest. And in a subsequent case, in the year 1716, the Lord Chancellor ordered the insured in a valued policy on goods, to discover what goods he had on board.

Le Pypre v. *Farr.* 2 *Vern.* 716.

But though a valued policy is distinguishable from a wager policy in this, that the former is founded on real interest, the amount of which is agreed by the policy, in the latter the insured has avowedly no interest at all: Yet, it must be owned that a valued policy evidently partakes of the nature both of a policy on interest and of a wager. On the one hand it supposes a *bonâ fide* interest in the insured; on the other, this interest is not always expected to be exactly commensurate with the amount of the insurer's obligation. There is a real interest it is true; but this frequently falls short of the nominal value in the policy; and it too often happens that wager policies are effected under colour of a small interest, and in the form of valued policies, and the beneficial effects of the stat. 19 *G.* II. c. 37, are thereby defeated.

Distinction between a valued policy and a wager.

The value in the policy, therefore, ought only to be considered as *primâ facie* evidence of the amount of the interest of the insured; for though this value is admitted by the insurer, yet, as he admits it upon the mere representation of the insured, if he find that this was fallacious, that it was factitious, and only a cover for a wager, it cannot be supposed that he is so far concluded by his admission, as not to be at liberty to dispute the value, and shew by evidence that it was a mere evasion of the act.

The value in the policy is only *primâ facie* evidence of the interest, and may be disputed.

By the law of *France*, the value in the policy shall be taken to be true as against the insurer, till he prove the contrary.(*a*) *Valin*, indeed, says that an insurer cannot be permitted to allege fraud in the value specified in the policy, so as to be let in to shew a new valuation, without shewing

How this is regulated by the *French* law.

(*a*) *Valin* sur art. 64, p. 136, *Pothier*, h. t. n. 151, 159, *Emerig.* tom. 1, p. 271, 2.

ſhewing that the value in the policy is at leaſt *one fourth too high*; (*a*) and for this he might have cited *Le Guidon*, ch. 2, art. 13. *Pothier*, on the contrary, holds that the value is only to be taken as juſt, till the inſurer impeaches it; and that the inſurer may be let in to prove the valuation to be too high, even where there is an expreſs clauſe in the policy to preclude ſuch inquiry, ſuch clauſes being always held to be illegal, (*b*) the rule of the civil law being, *Conventio, ne dolus præſtetur rata non eſt.* (*c*)—If the exception to the valuation prevail, it either reduces the ſum inſured to the value of the goods, or, if fraud appear in the valuation, avoids the policy, and bars the demand of the inſured: That is, if the inſured *knew* that the goods were over-valued; or even where there is a *preſumption* of fraud, ariſing from the concealment of a former inſurance. (*d*) For by the ordinance of the marine, (*e*) the inſurance ſhall be preſumed fraudulent, if the inſured do not declare all he has inſured; or even if he demand payment beyond the value of the effects inſured. For the moment the inſured would turn a loſs to his own advantage, and ſeek to recover more than he put in riſk, with whatever good faith he might have made the original valuation, he is guilty of fraud. (*f*) But however the exceſs may have originated, it is incumbent on him to ſhew that it proceeded from ſome error on his part, or on the part of his agents. *Pothier* and *Valin* ſay, however, that when the tranſaction admits of doubt, the judges, to mitigate the ſeverity of the law, are more inclined to impute the fault to error than to fraud; and therefore, unleſs fraud is made evident, a juſtification is readily received. (*g*)

In *England*, as we have already ſeen, we are not quite ſo rigid. Where a valued policy is *bonâ fide* meant as an *indemnity*, the courts will not inquire very minutely whether the valuation be very near the true intereſt of the inſured.

In *England*, if a valued policy be meant as an indemnity, the amount of the valuation will not be very ſcrupulouſly inquired into.

(*a*) Vid. *Valin* ſur art. 64, h. t.—(*b*) *Pothier*, h. t. n. 148, 156.—(*c*) *Dig.* lib. 13, tit. 6, n. 17.—(*d*) *Pothier*, h. t. n. 157.—(*e*) Ord. de la mar. h. t. art. 53, 54, 55.—(*f*) *Emerig.* vol. 1. p. 271, 272.—(*g*) *Valin* ſur art. 23, p. 67, *Pothier*, h. t. n. 78.

inſured. A ſmall exceſs ought not to be regarded. Conſidering the uncertainty of every valuation, a ſcrupulous exactneſs, in this point, would only occaſion endleſs litigation. But, on the other hand, if the intereſt proved be a mere cover for a wager, every court muſt pronounce the policy to be void, within the meaning of the ſtatute. (*a*)

But if it be only a cover for a wager, it will be void.

It is only in the caſe of a total loſs, that there is any material difference between an open and a valued policy. In the former, the value muſt be proved, in the latter, it is admitted. But in the caſe of a partial loſs, the like inquiry into the true amount of ſuch loſs is to be made, whether the policy be of the one ſort or of the other.—For if this were not to be done in the caſe of a valued policy, the conſequence would be, either that every partial loſs muſt be conſidered as a total one, or elſe that nothing ſhould be deemed a loſs at all, unleſs it were a total loſs. (*b*)

The only difference between an open and a valued policy is in the caſe of a total loſs.

Sect. 2.

How, and by whom the Policy may be effected.

IT ſeldom happens that there is any direct communication between the inſured and the inſurer. The buſineſs of negociating inſurances with the underwriters, and of getting policies effected, is uſually tranſacted by brokers who make this branch of buſineſs their profeſſion. Theſe inſurance brokers, from the importance of their employment, ought to be, and indeed generally are, perſons of great reſpectability and honour, in whom unlimited confidence may be ſafely repoſed. To the broker the merchant looks for the regularity of the contract, and a proper ſelection of reſponſible underwriters. To him alſo the underwriters look for a fair and candid diſcloſure of all material circumſtances affecting the riſk, and for the payment of their premiums.

Inſurance brokers.

Nature of their dealings.

There is uſually an open account between each broker and every underwriter with whom he has much dealing.

Account between brokers and underwriters.

(*a*) Vid. ſup. 103.—(*b*) Vid. 2 *Bur.* 1171.

ing. In this account the broker makes himſelf debtor to the underwriter for all premiums, and takes credit for all loſſes to which the underwriter is liable and which the broker is authorized to receive. Indeed it is generally underſtood, that by the uſage of trade in *London*, the underwriters give credit only to the broker for their premiums, and can reſort only to him for payment; and that he alone, and not the underwriters, can recover the premiums from the inſured. This point, however, has never been ſettled by any judicial determination. Perhaps it would be for the intereſt of all parties if this rule were fully eſtabliſhed, and conſtantly adhered to.

Though the premium is a debt due from the *broker*, yet a loſs is only due to the *principal*.

But though the underwriter thus looks to the broker for his premium, and though the broker in his account with the underwriter, takes credit for the loſſes and returns of premium, which he is authoriſed to receive from the underwriter; yet, ſuch loſſes are not to be looked upon as a *debt* from the underwriter to the broker.

Wilſon and others aſſignees v. *Creighton* and others, B R.M. 23 G. III. MS.

Therefore, where the aſſignees of a bankrupt who had been a policy broker, brought an action againſt the defendants, who were agents or factors to various correſpondents abroad, and the defendants claimed, by way of ſet off, the balance of an account between them and the bankrupts, in which they debeted themſelves for various premiums of inſurance, made on behalf of their correſpondents; and took credit for all loſſes and returns of premiums upon theſe inſurances. The defendants had no commiſſion *del credere*, and none of their correſpondents were inſolvent; but to all their correſpondents, except one, they were in advance on account of inſurances.—Upon this caſe, the court held that though credit for the premiums muſt be given to the broker, becauſe the underwriters know nothing of the principals; yet that they could not ſet of the loſſes or returns of premium due to the principals, and which *they* only could ſue for, againſt a debt due from the defendants to the bankrupt.

Grove v. *Dubois*, B. R. *Hil.* 26 G. III. MS.

In a ſubſequent caſe, where the action was brought by the aſſignees of an underwriter againſt the factor, it was determined, that the defendant might ſet off loſſes upon policies ſubſcribed by the bankrupt, and due to the defendant's

defendant's correſpondents? But there the defendant had a commiſſion *del credere*, which Lord *Mansfield* ſaid made him liable to his correſpondents for loſſes, without firſt bringing an action on the policy againſt the underwriter.

When the merchant happens to reſide at a diſtance from the place where he means to be inſured, the policy is uſually effected by the mediation of his agent or correſpondent there, who, if he be not himſelf a broker, employs one, and gives him all neceſſary inſtructions, with which he has been furniſhed for getting the inſurance effected.

Authority of an agent.

To make a man an agent, in ſuch caſe, he muſt either have expreſs directions from the principal to cauſe the inſurance to be made, or elſe it muſt be a duty ariſing from the nature of his correſpondence with the principal. And no general authority which he may have in relation to a ſhip or goods, will make him an agent for the purpoſe of inſuring on behalf of the parties intereſted. Therefore a ſhip's huſband, regularly appointed by deed executed by all the owners, with power to advance, lend, &c. to make all payments, and to retain all claims, &c. has no right to make inſurance for all, or any of the part owners, without a general direction from all, or a particular direction from each. (*a*)

The office of ſhip's huſband does not neceſſarily give him authority to inſure.

Three caſes in which an agent is bound to comply with an order to inſure.

Though one man cannot, in general, compel another againſt his conſent, to become his agent to procure an inſurance to be effected for him: Yet there are three caſes, wherein an order to inſure muſt be complied with.—

1ſt. Where a merchant abroad has effects in the hands of his agent or correſpondent here, he has a right to expect that the agent will comply with an order to inſure; becauſe he is entitled to diſpoſe of the money in his agent's hands in what manner he pleaſes.—2dly. Where the merchant abroad has no effects in the hands of his correſpondent here; but the courſe of dealing between them has been ſuch, that the one has been uſed to ſend orders for inſurance, and the other to execute them; the former has a right to expect that his orders for inſurance ſhall

1ſt. Where he has effects of his principal in his hands.

2dly. Where he has been in the practice of making inſurances, and has given no notice to diſcontinue.

(*a*) R. *French* v. *Backhouſe*, 5 *Bur.* 2727.

3dly. When he accepts bills of lading ſent him on condition to inſure.

ſhall ſtill be obeyed, unleſs the latter give him notice to diſcontinue that courſe of dealing.—3dly. Where the merchant abroad ſends bills of lading to his correſpondent here, with an order to inſure, as the implied condition on which he is to accept the bills of lading; and the correſpondent accepts the bills of lading, he muſt obey the order; for it is one entire tranſaction, and the acceptance of the bills of lading amounts to an implied agreement to perform the condition. (*a*)

The agent, as well as the broker, is anſwerable to his employer for negligence or unſkilfulneſs.

To the office of agent or broker, great reſponſibility attaches; and in the execution of it, therefore, it is the duty of each to conduct himſelf with the greateſt fidelity, punctuality, and circumſpection. For, in this, as in all other caſes, where a man, either by an expreſs or implied undertaking, engages to do an act for another, and he either wholly neglects to do it, or does it improperly or unſkilfully, an action on the caſe will lie againſt him to recover a ſatisfaction for the loſs or damage reſulting from his negligence, careleſſneſs, or want of ſkill.

Even if the agent prevent an inſurance from being effected, by limiting the broker to too ſmall a premium, he is anſwerable.

Therefore, if a merchant here accept an order from his correſpondent abroad to cauſe an inſurance to be made, but limit the broker to too ſmall a premium, in conſequence of which no inſurance can be effected; he is liable to make good the loſs to his correſpondent. (*b*)—For though it is his duty to get the inſurance done at as low a premium as poſſible, yet he has no right ſo to limit the premium, as to prevent the inſurance from being effected.

Even a *voluntary* agent is liable, if he take any ſtep in the buſineſs.

Even if a perſon voluntarily undertake to procure an inſurance to be effected, without the expectation of any remuneration for his trouble, though, perhaps, he is not bound to perform his undertaking; yet, in fact, if he do proceed to execute it, he will be anſwerable for any

(*a*) Per *Buller*, J. in *Wallace* v. *Tellfair*, at N. P. 2 T. R. 188 in notis, and in *Smith* v. *Laſcellis*, 2 T. R. 188, *Aſhurſt* and *Groſe*, Js. concurring.—(*b*) Per *Buller*, J. in *Wallace* v. *Tellfair*, at N. P. 2 T. R. 188 in notis. Vid. *Delancy* v. *Stodart*, 1 T. R. 22.

any negligence or unskilfulness in the conduct of it.—This will be exemplified in the following case.

A. gratuitously offers to get a fire policy renewed and transferred to *B.* but omits to get the assignment made: *A.* is liable for any loss occasioned to *B.* by this omission.

Wilkinson v. *Coverdale*, *Esp.* Rep. 74.

In an action on the case for negligence, it was stated in the declaration, that the plaintiff, in *August* 1792, purchased certain premises from the defendant, who had then a subsisting policy from the *Phœnix* fire office, from *December* 1791, to *December* 1792: That the defendant undertook to get this policy renewed on account of the plaintiff, and regularly transferred to him: That he did, in fact, renew the policy and paid 16*l.* which he charged to the plaintiff, but neglected to get it transferred from himself to the plaintiff, by the proper endorsement at the fire office; in consequence of which, the plaintiff, who sustained a loss by fire, was precluded from recovering on the policy.—On the trial, it was admitted on the part of the plaintiff, that there was no consideration moving from the plaintiff to the defendant for his undertaking, but that the defendant had undertaken to get the policy renewed and transferred gratuitously.—On this being admitted, Lord *Kenyon*, who tried the cause, expressed a doubt whether any action could be maintained on such an undertaking.—To remove this doubt, the plaintiff's counsel cited *Wallace* v. *Tellfair*, a case similar to the present, in which Mr. Justice *Buller* had ruled at *nisi prius*,—"That though there be no consideration for one party's undertaking to procure an insurance to be effected for another; yet, that where a party voluntarily undertakes to do it, and proceeds to carry his undertaking into effect, by getting a policy underwritten, but does it so negligently or unskilfully that the insured can derive no benefit from it; in that case he is liable to an action."—Lord *Kenyon* acquiesced in this distinction, and suffered the cause to proceed: But the plaintiff failing in the proof of any promise by defendant to procure the insurance to be renewed and transferred as stated in the declaration, he was nonsuited.

A policy broker employs another policy broker, but omits to give him all the in-

So, where the defendant, who was a policy broker in *London*, employed another broker in *London*, by the directions of the plaintiff who resided at *Liverpool*, to effect a particular policy, but omitted, through inadvertence, to deliver

ſtructions he is furniſhed with: He ſhall anſwer for the loſs occaſioned by his omiſſion, though he derived no profit from the tranſaction.

deliver to him, with his other inſtructions, a letter from the plaintiff, containing material information reſpecting the time of the ſhip's ſailing, and which ought to have been ſhewn to the underwriters.—A loſs having happened, the underwriters refuſed to pay on account of this concealment; and upon this ground the plaintiff, in an action on the policy againſt one of the underwriters, was nonſuited. The plaintiff brought the preſent action againſt the defendant for the damage occaſioned by his negligence in not delivering the letter to the broker who effected the inſurance.—It was objected at the trial that as the defendant himſelf had no ſort of remuneration for his trouble, an action could only be maintained againſt him upon the ground of *wilful negligence*.—But Lord *Eldon*, who tried the cauſe, held clearly, that the defendant having taken upon himſelf to employ the other broker, he was bound to communicate to him all the inſtructions he had received, and having omitted to do this, he was liable for all the conſequences.—In ſettling the amount of the damages in this caſe, the plaintiff inſiſted on including the coſts of the action brought upon the policy.—But Lord *Eldon* ſaid that there was no neceſſity to bring that action in order to entitle the plaintiff to recover in the preſent caſe; and as it did not appear that the action upon the policy was brought by the deſire, or with the concurrence, of the preſent defendant, he ought not to be charged with the coſts of it.

Seller v. *Work*, at N. P. after Hil. 1801. MS.

The defendant in ſuch action is not liable for the coſts of an action brought on the policy, unleſs it was brought by his deſire.

The agent muſt alſo act fairly by the inſurer.

But it is not only the duty of the agent, in tranſacting the buſineſs of inſurances, to conduct himſelf with fidelity and punctuality towards his employer; he is alſo bound to obſerve the ſtricteſt veracity and candour towards the inſurer. Indeed he cannot be a faithful agent to the one, without dealing honourably with the other; for any concealment, miſrepreſentation, or other fraud committed by the agent will have the ſame effect in avoiding the policy, as if it were committed by the inſured himſelf, even though it be done without his privity or knowledge, (*a*) or ignorantly, (*b*) or even contrary

Any fraud or concealment by him will avoid the policy, even though the inſured be innocent of it.

(*a*) *R. Stewart* v. *Dunlop*, poſt. c. 10. § 1.—(*b*) *R. Fitzherbert* v. *Mather*, 1 T. R. 12, poſt. c. 9. § 1.

trary to his directions. For it is a maxim of law that, if one of two innocent perſons muſt ſuffer by the fraud or negligence of a third, the loſs ſhall fall on him who truſted the third perſon.

In an action againſt an agent or broker for negligence or unſkilfulneſs in effecting an inſurance, the plaintiff is entitled to recover to the ſame amount as he might have recovered againſt the underwriters had the policy been properly effected, but he can only recover what, *in point of law*, he might have recovered on the policy; and not what the indulgence or liberality of the underwriters might probably have induced them to pay. (*a*)—And, in ſuch an action, the agent may avail himſelf of every defence, ſuch as fraud, deviation, non-compliance with warranties, &c., which the underwriters might have ſet up in an action on the policy. (*b*)

In ſuch action the plaintiff ſhall recover the ſame as in an action againſt the inſurer.

But where the agent uſes due diligence, and does what is uſual to get the inſurance effected, that is ſufficient: As if he ſend to *Lloyd*'s, and the underwriters refuſe to take the riſk, becauſe the ſhip was not regiſtered; and upon this he ſend to *Newcaſtle*, and gets it done there: He has done all that could be required of him; and no action will lie againſt him for not inſuring in *London*, eſpecially if the owner has adopted his acts. (*c*)

But if the agent act in the uſual manner, it will be ſufficient.

There are many reaſons why an agent or broker ought not to be an inſurer. He becomes too much intereſted to ſettle with fairneſs the rate of premium, the amount of partial loſſes, &c. And though he ſhould not, himſelf, create any unneceſſary delay or obſtacle to the payment of a loſs, he will not be over anxious to remove the doubts of others. Beſides, he ought not, by underwriting the policy, to deprive the parties of his unbiaſſed teſtimony, in caſe of diſpute. For though there may be no legal objection to his *competency*, as a witneſs for the other underwriters, (*d*) it is impoſſible that his *credit* ſhould be altogether

An agent or broker ought not to be an underwriter.

(*a*) R. *Webſter* v. *De Taſtet*, 7 T. R. 157, ſup. 74.—(*b*) Per Lord *Kenyon*, in *Wilkinſon* v. *Coverdale*, at N. P. after M. 34 *G.* III. *Park* 303.—(*c*) Per *Buller* J. at N. P. in *Smith* v. *Colegan*, 2 T. R. 188 *in notis*.—(*d*) Vid. *Bent* v. *Baker*, T. R. *H. Bl.*

gether free from ſuſpicion. The principal, in ſhort, can never place any reliance in one who makes himſelf an adverſe party, and who is, at the ſame time, above all others, in a capacity to abuſe his confidence.

The inſured may maintain trover for the policy, and recover in like manner as againſt the underwriters.

The policy, when effected, becomes the property of the inſured, in whoſe hands ſoever it may happen to be; ſubject, however, to any fair or equitable *lien* which the holder may have upon it: And if it be wrongfully withheld, the inſured may maintain an action of trover; and in ſuch action he ſhall prove his loſs, and recover in like manner as in an action againſt the inſurer.

If an agent pretend that he has effected a policy, trover will lie againſt him for it, tho' none has been effected.

If an agent or broker, meaning to appropriate the premium to himſelf, and take the chance of a ſafe arrival, repreſent to his employer that an inſurance has been effected agreeably to his inſtructions, a practice but too prevalent, the principal may maintain trover for the policy againſt the agent or broker; and, upon proof of a loſs, he ſhall recover to the ſame amount as he would have been entitled to recover againſt the underwriters, had a policy been effected. This will appear by the following caſe.

A broker informs his employer that he has effected a policy for him; —In trover for the policy, The plaintiff ſhall prove his loſs as in an action againſt the inſurer; and the broker ſhall not be permitted to ſay that no ſuch policy exiſts.

Harding v. *Carter* and another, at N. P. Eaſt. Vac. 1781, *Park* 4.

An action of trover was brought againſt the defendants, who were brokers, for a policy of inſurance; and it appeared on the trial, that they had written to the plaintiff, the maſter of the veſſel, that they had got two policies effected; the one on account of his clothes and wages, the other on account of the owners; and that the underwriter was Mr. *Newnham*.—A loſs having happened, the defendants produced a policy underwritten by one *J. S.*, upon the ſhip only, in which the plaintiff had no intereſt.—Lord *Mansfield*, who tried the cauſe, ſaid;—"I ſhall conſider the defendants as the actual inſurers, and therefore the plaintiff muſt prove his intereſt and loſs."—The defence ſet up was, that the letter to the plaintiff was written by the defendant's clerk through miſtake: It was alſo contended that trover would not lie for that which never exiſted. But his Lordſhip would not ſuffer the defendants then to contradict their own repreſentation; and the plaintiff accordingly had a verdict to the amount of his intereſt, deducting the premium.

Sect.

Sect. 3.

Of the Form and Requiſites of the Policy.

At what time the preſent form of the policy was introduced.

IT is very probable that the form of a policy of inſurance nearly ſimilar to that which we have now in uſe, was introduced into *England* by the *Lombards*, with their other commercial improvements. (*a*) In the courſe of ſeveral centuries this form muſt have undergone ſome alteration. But the fear of departing too far from the original muſt have ſuggeſted the clauſe inſerted in every policy, that 'it ſhall be of as much force and effect as 'the ſureſt writing or policy of aſſurance heretofore made 'in *Lombard-Street*,' &c. And merchants, apprehenſive of the danger attending every innovation in the forms of commercial contracts, have always been particularly tenacious of the form of this important inſtrument, though, in itſelf, extremely inaccurate, and unſkilfully framed. (*b*) But length of time, frequent diſcuſſion, and repeated deciſions upon the conſtruction of it, have reduced it to a conſiderable degree of certainty.

How it ought to be conſtrued.

From the nature and object of this contract, courts of juſtice have always conſtrued it according to the intention of the parties, and ſo as that the indemnity of the inſured, and the advancement of trade, which are the great objects of inſurance, may be attained. The *ſtrictum jus*, or *apex juris*, is not to be laid hold of; but it is to be conſtrued largely for the benefit of trade, and of the inſured. The conſtruction ſhould alſo be according to the courſe of the trade in the place. (*a*)

When

(*a*) Vid. *Malyne lex merc.* 108.—(*b*) Mr. Juſtice *Buller* ſays, that it has always been conſidered in courts of law as an abſurd and incoherent inſtrument. 4 T. R. 210.—(*c*) Per *Lee*, C. J. in *Tiernay* v. *Etherington*, cited by Lord *Mansfield*, 1 *Bur.* 348.

The interpretation ſhould be according to the rules of the common law.

When a clauſe is clear in itſelf, it ought to be underſtood literally. (*a*) But when clauſes are obſcure, the beſt and only mode of fixing their meaning is by the rules of the common law; becauſe the parties muſt be preſumed to make their agreements ſubject to that law.

Occaſional clauſes.

It is often neceſſary to introduce additional clauſes into the policy, to adapt it to the particular ſtipulations of the parties, and it cannot but be matter of ſurpriſe to obſerve that theſe clauſes, though ſometimes of the utmoſt importance to the parties, are drawn up, not only without advice, but even without common attention to their import. Lord *Mansfield*, while obſerving upon the inaccuracy of one of theſe clauſes, declared that he did not recollect an inſtance of an addition of this ſort, which had not created doubts on the conſtruction of it; and this frequently happened where a word or two more or leſs, would have rendered the whole perfectly clear. (*b*)

How occaſional clauſes ſhould be conſtrued.

In conſtruing ſuch clauſes it might not be improper to inquire by whom they were introduced; for if the party introducing them might have explained himſelf clearly and explicitly, his not doing ſo ought not to afford him an occaſion to impoſe reſtrictions upon the other party, which he has not ſo diſtinctly expreſſed. (*c*)

The uſual requiſites of a policy.

The uſual requiſites of a policy are ten, which we will conſider in the order in which they occur.

1. *The Name of the Inſured, his Agent, or Truſtee.*

In *France* the policy was underwritten in blank, and afterwards filled up.

In *France* it was uſual, at the time *Emerigon* wrote, for the broker to produce the policy in blank to the underwriters, who ſigned it without ſeeing more than a ſhort

(*a*) Il n'eſt pas permis d'interpréter ce qui n'a pas beſoin d'interpretation. *Vattel* liv. 2. ch. 17, n. 263.—(*b*) *Doug.* 257.—(*c*) Pactionem obſcuram iis nocere, in quorum fuit poteſtate legem apertius conſcribere. *Dig.* l. 2. tit. 14. de pactis leg. 39.—Labeo ſcripſit obſcuritatem pacti nocere potius debere venditori qui id dixerit, quam emptori; quia potuit re integrâ apertius dicere. *Dig.* l. 18, tit. 1, de cont. emp. leg. 21.

ſhort memorandum endorſed on it; and the broker afterwards filled up the policy at his leiſure. It muſt be owned that there are ſometimes critical moments which will admit of no delay. Nothing but a caſe of ſuch urgent neceſſity can juſtify ſo extraordinary a practice; and though ſeveral laws had been made to reſtrain it, yet it ſtill continued to prevail, at leaſt at *Marſeilles*. (*a*)

When the policy, however, was filled up, it was neceſſary to inſert the name of the inſured, or of his agent, and whether he were agent or principal.(*b*)

Policies in *England* were formerly in blank as to the name of the inſured. This was remedied in 1774, as to inſurances on lives.

With us it was formerly the practice to effect policies in blank, as to the name of the inſured. This being found productive of many inconveniences, a regulation was adopted in *England*, in the year 1774, with reſpect to inſurances upon lives, (*c*) ſimilar to ſome that had been introduced in ſome foreign countries, on the ſubject of marine inſurances; and about the year 1785, it became a ſubject of complaint amongſt underwriters that the policies were ſo looſe and indefinite, that they had no opportunity of knowing for whom the inſurances were made, nor what was the nature of the things inſured. They therefore deſired to know at leaſt the name of ſomebody concerned, no matter whether the principal or the agent; for though they might not know the principal, yet, if they knew the agent, they might have ſome confidence, that if he were a merchant, or other perſon of character, he would not be engaged in a diſhoneſt tranſaction. (*d*) Theſe conſiderations induced the legiſlature to paſs the ſtat. 25 *G.* III. c. 44, which, after reciting that certain miſchiefs had reſulted from the practice of effecting marine inſurances in blank, directed "That where the in-'ſured reſides in *Great Britain*, his name, or that of his 'agent ſhould be inſerted in the policy, as the perſon in-'tereſted; and where he reſided abroad, the name of his 'agent ſhould be inſerted.'

Inconveniences of marine policies being in blank.

By 25 *G.* III. c. 44, the name of the inſured or his agent was to be inſerted, if the inſured reſided in *Great Britain*; if not the name of his agent.

Upon

(*a*) *Emerig.* tom. 1. p. 47. Vid. 2 *Magens*, 65, 169.—(*b*) *Emerig.* tom. 1. p. 55.—(*c*) Stat. 14 *G.* III. c. 48.—(*d*) Vid. Mr. Juſtice *Buller*'s obſervations on the ſtatutes, 25 and 28 *G.* III. 1 *Pul.* and *Boſ.* 321 and 352.

How this was construed.

Upon the construction of this act it was, soon after the passing of it, determined, that the agent's name must be inserted *eo nomine*, as agent; and that if the principal were abroad, the agent in whose name the insurance was made, must be resident here; (*a*) and it was likewise holden that the names of *all* the parties interested should be also inserted. (*b*)

This act was repealed by the 28 *G.* III, c. 56, which provides that the names or firm of the persons interested or the name of one of them, or the name of the person who gives or receives the order to insure, shall be inserted.

This being found productive of greater inconveniences than those which the act was meant to remove, it was repealed by the stat. 28 *G.* III. c. 56. But it was still thought advisable to restrain the making of policies in blank; and therefore this last act provides, that 'No 'person shall effect any policy, on any ship or goods, 'without first inserting the name or names, or the usual 'stile and firm of dealing, of one or more of the persons 'interested; or of the consignor or consignors, consignee 'or consignees, of the property to be insured; or of the 'person or persons residing in *Great Britain* who shall 'receive the order for, and effect such policy; or of the 'person or persons who shall give the order to the agent 'or agents immediately employed to negociate or effect 'such policy; and every policy made contrary to the 'true intent and meaning of this act, shall be null and 'void.'

This act ought to be construed liberally and according to its intent. Therefore if a consignee refuse to accept a cargo of goods, or to accept bills of exchange for the amount, the general agent of the consignor becomes in effect the consignee, and may insure in his own name.

This act ought not to be taken in its strict literal sense, but ought to receive a liberal construction, according to its *true intent and meaning*. And therefore the following case will shew, that if bills of exchange, drawn on the consignee of a cargo of goods, for the amount of them, be sent, together with bills of lading, by the consignor to his general agent, with directions to deliver the bills of lading to the consignee, on his accepting the bills of exchange; if the consignee refuse to receive the goods, or to accept the bills of exchange, the agent becomes in effect the consignee, within the intent and meaning of the statute; and may insure the goods as *agent for the consignor*; or, *in his own right*, if he has accepted bills on the credit of the goods.

(*a*) R. *Praye* v. *Edie*, 1 T. R. 313.—(*b*) Per *Buller*, J. in *Wilton* v. *Reaston*, at N. P. after Mich. 1787, *Park* 17.

An inſurance was made by the plaintiffs "as well in "their own names, as for and in the name and names of "all and every other perſon or perſons to whom the ſame "did, might, or ſhould appertain, in part or in all, upon "goods on board the ſhip *Fabrſunds Wharf*, at and from "*Fabrſund* to *London*."—The ſhip being loſt on the voyage inſured, an action was brought on this policy; and the firſt count in the declaration averred that the inſurance was made by the plaintiffs reſiding in *Great Britain*, as agents, and for the uſe of one *Jochum Brink Lund*, who was intereſted in the goods to the amount of the ſum inſured; and the ſecond count averred the intereſt to be in the plaintiffs, and that they made the inſurance on their own account. The defendant having tendered the premium, pleaded the tender. Upon the trial of the cauſe it appeared, that the plaintiffs were the general agents in *London* of one *Lund*, a merchant at *Fabrſund* in *Norway*, who had agreed with certain perſons in *London*, under the firm of the *Cudbear* company, to ſupply them with a quantity of moſs; and having, on the 12th of *November* 1796, ſhipped 574 ſacks of moſs at *Fabrſund*, conſigned to the *Cudbear* company, and upon their account and riſk, tranſmitted to the plaintiffs the invoice and bill of lading, in a letter containing theſe words,—"Pleaſe to hand the incloſed to the *Cudbear* "company, that theſe friends may have an opportunity "to ſecure themſelves by inſuring the moſs cargo, the "ſeaſon being ſo far advanced." That on the 10th of *December* 1796, *Lund* drew a bill on the *Cudbear* company for 1112 l. 8s. 2d. the amount of the cargo, in favour of the plaintiffs, and ſent it to them to procure acceptance thereof, and place it to his credit; and, at the ſame time, adviſed the plaintiffs that he had drawn on them for 300l. which bill they afterwards accepted and paid.—That the *Cudbear* company received the bill of lading and invoice, and the bill for 1112 l. 8s. 2d. being preſented to them for acceptance, they refuſed to accept it, or take the cargo, or to inſure it; and returned the bill of lading and invoice to the plaintiffs. That the plaintiffs thereupon cauſed the above inſurance to be made on the

A. having conſigned goods to *B.* and drawn bills on him to the amount of them in favour of *C.* his general agent, ſends theſe bills, together with the bills of lading, to *C.* deſiring him to tranſmit them to *B.* that *B.* may have an opportunity of inſuring. *A.* alſo draws a bill on *C.* for 300l. which is accepted and paid. *B.* refuſes to take the goods, or accept the bills drawn on him. *C.* then inſures in his own name, and informs *A.* thereof, who approves what he has done.—*C.* may maintain an action on the policy, as agent of *A.* and aver the intereſt to be in him; *C.* being in effect conſignee, on *B.*'s refuſal to take the goods, and alſo having in effect received, as well as given, the order to inſure, within the meaning of the 28 *G.* III. c. 56.—*C.* may alſo declare in his own right, averring intereſt in himſelf, he having an in-

ſurable intereſt to the amount of 300l.

Wolff and others, v. *Horncaſtle*, 1 *Pul.* and *Beſ.* 316.

the 9th of *January* 1797, without any order ſo to do; and the next day wrote to *Lund*, informing him what had been done; that *Lund*, in his anſwer, approved of their having taken the precaution to inſure the moſs cargo, and informed them of the ſhip's having ſailed.—On this caſe it was contended on the part of the defendant, that the ſtat. 28 *G.* III. c. 56, (*a*) requires that the name of the perſon intereſted, or of the conſignor, or conſignee, or of the perſon who gives, or receives, the order to inſure, ſhould be inſerted in the policy; none of which characters applied to the plaintiffs, who had received no order to inſure, at the time the policy was effected; and the ſubſequent approbation of *Lund* could not be deemed equivalent to a previous order, and therefore the policy was void.—But the court determined that the policy was good within the meaning of the ſtatute, and that the plaintiffs had an inſurable intereſt.—Mr. Juſtice *Buller* (*b*) ſaid,—"This policy in its frame is very much like thoſe we uſed to ſee ſome years before the legiſlature interpoſed in the ſtat. 25 *G.* III. c. 44; (*c*) only I remember that the words, "*as intereſt may appear*," were then uſually added. The ſhip ſailed on her voyage with the goods on board; the premium was paid; it was a real *bonâ fide* tranſaction, and no fraud has been ſuggeſted; a loſs has happened, and the underwriter now chooſes to ſay, that, for want of a ſtrict compliance with the ſtat. 28 *G.* III., he ſhall be excuſed from paying the money. Time was, when no underwriter would have dreamed of making ſuch an objection; and if his ſolicitor had ſuggeſted a loop-hole by which he might have eſcaped, he would have ſpurned at the idea. If, however, the defendant can bring his caſe within the ſtatute, he has a right to do ſo, and we are bound to give him judgment. But he has brought it neither within the words or the meaning of the ſtatute: And even if he had brought it within the words, and not within the meaning, I ſhould be clearly of opinion, that we ought to

(*a*) Sup. 214.—(*b*) Lord C. J. *Eyre* was abſent.—(*c*) Sup. 213.

to decide againſt him, according to the directions of the ſtatute, which in the laſt clauſe ſays, "Every policy of "inſurance made contrary to *the true intent and meaning* "of this act, ſhall be null and void." By putting the two acts 25 G. III. and 28 G. III. together, we may learn the true ſpirit and meaning of the latter of theſe acts, which we are bound to ſay, muſt receive the moſt liberal conſtruction that the words will bear. From the language of the two ſtatutes, as well as the conſideration that we are conſtruing a contract *uberrimæ fidei*, viz. a policy of inſurance, we muſt avoid being harder upon the plaintiffs than is abſolutely neceſſary. Let us ſee whether the plaintiffs do or do not come within any of the deſcriptions of perſons in the laſt ſtatute. Theſe deſcriptions are four; the *conſignor* and *conſignee*, the perſon *receiving*, and the perſon *giving*, the order. The plaintiffs are certainly not the conſignors; but I am by no means clear that they are not the conſignees. It is true that the goods were originally conſigned to another perſon: But the caſe muſt be conſidered as it ſtood at different periods; and though the *Cudbear* company were clearly the conſignees at firſt, it does not follow that they continued to be ſo. A conſignee is a perſon to whom the goods are to be delivered when they arrive at the port of delivery. *Lund*, that he may be ſure of being paid, and not chooſing to truſt the *Cudbear* company, ſends the bill of lading, with a bill on them for acceptance to the plaintiffs, who are his general agents. If the *Cudbear* company had received the goods, they would have been the conſignees; but they refuſed to receive them. Then who was entitled to receive them? It cannot be pretended, that nobody had the right. The captain could not keep them. Then, to whom could the right belong, but to the perſons who had the bill of lading, and were the general agents of the conſignor? From the moment, therefore, that the *Cudbear* company refuſed the goods, the plaintiffs became the conſignees. If this be ſo, there is no objection to the policy, and I am ſatisfied I do not carry this conſtruction too far, in favour of the juſtice of the caſe.—The next character mentioned in the

ſtatute,

ſtatute, is *the perſon who receives the order* to make inſurance. The goods were originally intended for the *Cudbear* company. But they were ſent, accompanied by a letter, from which the plaintiffs muſt have ſeen that it was *Lund*'s intention to have them inſured. It was his intereſt that they ſhould be inſured; and it is agreed, that a general agent has a right to exerciſe his diſcretion for the benefit of his principal. He muſt act on the ſpur of the occaſion; and if nothing elſe had paſſed, I have doubts whether *Lund* would not have been liable to pay the premium. But his ſubſequent approbation brings the caſe within the maxim, that *omnis ratihabitio retrotrahitur, et mandato priori æquiparatur.* I am clear, therefore, that the plaintiffs received the order to make this inſurance, within the meaning of the act.—The laſt character mentioned in the act, is the *perſon giving the order* to make inſurance. Now it is impoſſible to ſtate a caſe that comes more directly within the act of Parliament than this. Here the plaintiffs were the perſons immediately concerned; they employed the broker, and gave the immediate order for the inſurance, and conſequently they come within the words of the act. The caſe therefore, upon the firſt count, is clear of all objections, and is in law, conſcience, and juſtice, in favour of the plaintiffs.—With reſpect to the ſecond count, I hold that the plaintiffs had a clear right to inſure to the amount of 300 l. for which they were intereſted in the goods. I agree that a debt which has no reference to the article inſured, and which cannot make a *lien* on it, will not give an inſurable intereſt. But a debt which ariſes in *conſequence* of the article inſured, and which would have given a *lien* on it, does give an inſurable intereſt. The caſe is not at all altered by the circumſtance of the goods not having arrived. There is no tranſaction more common in the city of *London*, than to raiſe money on the ſecurity of a bill of lading and policy. Theſe plaintiffs, having advanced their money on that ſecurity, muſt, if the goods had arrived, have received 300 l. out of them: The goods being loſt, the policy ſtands in place of them, and the plaintiffs are entitled to receive that ſum under it.

A general agent may inſure without an order for that purpoſe, when it is for the intereſt of his correſpondent that he ſhould do ſo.

A debt which would have given a *lien* on the thing inſured, gives an inſurable intereſt.

The

The chief juſtice, when this caſe was firſt moved, delivered a clear opinion in favour of the plaintiffs, and I think the caſe moſt decidedly with them."—Mr. Juſtice *Heath* fully concurred in this opinion, and ſaid,—"This ſtatute was made to prevent unlawful gaming; it therefore enacts, that no perſons ſhall recover under policies of inſurance, but thoſe who have either an intereſt as principals, or have acted as agents: In the firſt place, then, I think the plaintiffs were clearly the conſignees of the goods; for the bills of lading were ſent to them, and they had a right to take poſſeſſion. The act alſo ſays that if the name of the conſignor or conſignees be not inſerted, that of the perſon giving the order for the inſurance ſhall be inſerted. While the ſhip is in ſafety, where is the difference whether the agent inſure without order, and the principal afterwards approve of the inſurance; or, firſt receive the order, and then inſure.—On the ſecond count, it is equally clear, that the plaintiffs had an inſurable intereſt. It is true, that if the *Cudbear* company had altered their minds and taken the cargo, the plaintiffs would have had no intereſt; but if they had a contingent and reaſonable expectation of intereſt, it was ſufficient to entitle them to inſure, according to what is held in *Le Cras* v. *Hughes*, (*a*) viz. that a certain expectation of recovering from the crown, property captured for the emolument of the captors, would give an inſurable intereſt."

A contingent and reaſonable expectation of intereſt is ſufficient to entitle the party to inſure.

So where an inſurance was effected in the name of *Grandelos Meſle* and company, who were brokers, and alſo agents to *De Vignier* the plaintiff in ſeveral money tranſactions, and both reſided in *London*. *Grandelos Meſle* and company were not deſcribed as agents in the policy, but in the declaration were ſtated to be "the perſons reſiding in *Great Britain* who received the order for, and effected the inſurance," and the intereſt was averred to be in the plaintiff.—A verdict being found for the plaintiff, the defendant moved to ſet it aſide and enter a nonſuit, on an objection to the form of the policy, as not

If the name of the broker effecting the policy be inſerted in it, it is a ſufficient compliance with the 28 G. III. c. 56, though he be not deſcribed therein as *agent*.

De Vignier v. *Swanſon*. 1 *Pul.* and *Baſ.* 346, n.

(*a*) Sup. 84.

not ſufficiently complying with the ſtat. 28 *G.* III. c. 56. becauſe effected in the name of *Grandelos* and company, without ſtating them to be *agents*. But upon the caſe coming on to be heard, Lord *Kenyon* ſaid, he was ſurprized to find that the rule had been drawn up, as there was nothing in the caſe; and accordingly it was diſcharged without argument.

So, though it ſhould appear that the agent named in the policy be not *general* agent, but only agent for that particular purpoſe.

Bell v. *Gilſon*, 1 *Pul.* and *Boſ.* 345, ſup. 71.

The ſame objection was made, notwithſtanding the two foregoing caſes, in a caſe in which the policy deſcribed *Barret* and company, the brokers, in whoſe names it was effected, "as agents;" and a diſtinction was endeavoured to be made between this and the two foregoing caſes, upon the ground, that in thoſe, the perſon named in the policy, was the *general* agent of the party intereſted; whereas, in this caſe, *Barrett* and company were only agents for this purpoſe.—But the court over-ruled this objection, ſaying, that after the two foregoing deciſions, one in the *King's Bench*, and the other in the *Common Pleas*, within the ſame term, upon the ſame point, this queſtion ought to have remained at reſt.

Vid. inf. ch. 11, § 4.

2. *The Names of the Ship and of the Maſter.*

In a policy on goods, the ſhip muſt be named.

In almoſt all caſes of inſurance upon goods, it is uſual and neceſſary to ſpecify in the policy the ſhip in which they are to be tranſported: For, as ſhips are not all of equal ſtrength and goodneſs, nor equally capable of performing any particular voyage, the inſurer would be unable to form a juſt judgment of the riſk, unleſs he were informed of the name and deſcription of the veſſel. (*a*) This being inſerted in the policy, it becomes a part of the contract that the adventure ſhall be on board the very ſhip ſpecified, and no other; nor can any other veſſel be ſubſtituted for it, unleſs through neceſſity, or with the conſent of the inſurer. (*b*) It

And the ſhip cannot be changed but from neceſſity, or with the conſent of the inſurer.—Vid. inf. ch. 11. § 3.

(*a*) Quia non par eſt ratio aſſecurationis, quando merces devehuntur, in una navi, et quando in altera; imo ſolet id principaliter conſiderari inter ipſos aſſecuratores, cum una navis ſit magis fortis quam alia. *Roc.* h. t. not. 28. Vid. *Santerna*, h. t. p. 3. n. 315. *Stracca*, gloſ. 8. n. 10.—(*b*) The ſubject of changing the ſhip will be found fully treated, inf. c. 11, § 3.

In what caſes goods may be inſured on board *ſhip or ſhips.*

Vid. inf. ch. 12. § 4.

It often happens, however, that in the trade carried on with diſtant countries, particularly in time of war, it is uncertain by what ſhips goods may be ſent from thence to *Europe*. It is, therefore, of great importance to the merchant to be at liberty to avail himſelf of the firſt veſſels that may offer for that purpoſe, and to make his inſurance on the goods on board ſuch veſſels; and, in ſuch caſe, the policy is upon the goods '*on any ſhip or ſhips*;' and this is now ſo well eſtabliſhed, both by uſage and authority, that the legality of it is indiſputable.

The ſpecies of veſſel muſt be truly mentioned.

Not only the name, but alſo the ſpecies of veſſel ought to be mentioned; and if this be done falſely, in order to miſlead the inſurer, and diminiſh the riſk, as if a brig, a ſloop, or other ſmall veſſel be deſcribed as a *ſhip*; this will vitiate the contract. But if the error in the deſcription of the veſſel ariſe only from miſtake or inadvertence, and it does not affect the riſk; or if the inſurers knew upon what veſſel the riſk was to be run, the falſe deſcription in the policy will not affect the contract. (*a*)

If the ſhip be a privateer or letter of marque, ſhe ſhould be deſcribed as ſuch.

Emerigon ſays, that if the inſurance be made on a *privateer*, this ſhould be mentioned in the policy: And even in the caſe of a *letter of marque*, it is prudent, he ſays, to deſcribe her as ſuch. And he adds, that if this circumſtance be not declared, and the ſhip be captured in purſuit of an enemy which ſhe might have avoided, the inſurers ſhall not anſwer for the loſs. (*b*)

The name of the maſter muſt likewiſe be ſpecified.

The name of the maſter, alſo, ſhould be ſpecified; becauſe his character and ability are material ſubjects of conſideration in eſtimating the riſk. (*c*) If the name of the maſter ſtood alone in the policy, without any clauſe to enable the inſured to employ another in his place, it would be a part of the contract that he, and no other, ſhould go for maſter; nor could any other be ſubſtituted in his place, unleſs in a caſe of neceſſity, or by conſent of

But the owner may change the maſter.

(*a*) *Emerig.* tom. 1, p. 164.—(*b*) *Emerig.* tom. 1, p. 161.—(*c*) In *France* and *Holland* the inſertion of the names of the ſhip and the maſter is enjoined by poſitive law. With us there is no ſuch law. The whole reſts on uſage, and the neceſſity of inſerting what is ſo proper for the inſurer to know.

of the insurer. To obviate the difficulties that must arise from this, the following words are always added in our policies, "*or whosoever else shall go for master in the said ship.*" (*a*)—But though this clause enables the owner to change the master when he sees occasion to do so; yet he ought not to do this wantonly or unnecessarily; much less ought he to name one, when he means to employ another; for this could only be done for the purpose of deceiving the underwriters, and would, of itself, be strong evidence of fraud.

But this ought not to be done unnecessarily.

3. *The subject Matter of the Insurance.*

The policy must likewise specify the subject matter of the insurance, whether it be goods, ships, freight, respondentia, bottomry securities, or other things.

It may be on goods and merchandizes generally.

If the insurance be on goods, it is not necessary to particularize the different sorts; it is usually expressed to be '*upon any kind of goods or merchandizes.*' In many cases it would be impossible to specify the different sorts of goods of which a cargo may consist; and this is the less necessary, because the memorandum inserted at the foot of every policy, protects the underwriter from any partial losses on those articles which are most perishable, and from small partial losses on all others. (*b*)—Where the particular goods insured are meant to be specified, this is usually done at the foot of the policy; thus, '*On woollen cloth;*' sometimes on goods generally, with the mark of each bale, cask, &c.—It is not necessary that the goods should be specified in the policy; yet this is sometimes done for the satisfaction of the underwriters. And where they are specified, if they be not put on board, the policy will be void, although the insured have other goods of equal value on board. As if an insurance be made on a quantity of *tortoise shell* on board a certain ship;

Or the goods may be specified.

If the goods specified be not put on board, the policy will be void, tho' the insured have other goods of equal value on board.

(*a*) The *French* express it, '*ou autre pour lui.*' This clause appears to be very ancient, and is found in the forms of the policies of most foreign countries. Vid. *Emerig.* tom. 1, p. 182.

(*b*) Vid. sup. c. 6, § 3.

ſhip; but inſtead of tortoiſe ſhell, a quantity of *indigo* is ſhipped for the inſured: The inſurer ſhall not be liable for any loſs upon the indigo.—So, if an inſurance be made on *oils and barilla*; this will not protect a cargo of *ſoap*, though theſe are the principal ingredients in ſoap. The ſpecies of a thing is aſcertained by its ſubſtantial form.—That being changed, produces a new ſpecies and deſtroys the old. And yet an inſurance on ingots of gold has been holden to protect the metal converted into utenſils or coin; becauſe the ſubſtance is ſpecifically the ſame, and may be converted into ingots again. (*a*)

When, indeed, a cargo conſiſts of very few articles, it may be proper to mention them particularly. And where the goods are valued by the hogſhead, pipe, bale, &c. it is of courſe to ſpecify the commodity. But if an an inſurer ſubſcribe a policy 'upon any kind of goods 'and merchandizes,' there can be no queſtion but that he is bound by it, though no one article be ſpecified. (*b*)

When the goods conſiſt of but few articles, or are valued by the hogſhead, pipe, bale, &c. they are generally ſpecified.

Reſpondentia and bottomry ſecurities are a ſpecies of property which may be the ſubject of inſurance, though they are in effect themſelves a ſpecies of inſurance. But then they muſt be particularly and ſpecifically deſcribed in the policy; for, under the general denomination of *goods*, theſe ſecurities cannot be inſured. This will appear in the following caſe.

Reſpondentia and bottomry ſecurities muſt be inſured *eo nomine* as ſuch.

An inſurance was made, "on *goods and merchandizes*, on "board a certain ſhip, at and from *Bengal* to *London*."—Before the ſigning of the policy, the plaintiff had lent captain *Tryon* 764 l. upon reſpondentia, upon goods of greater value belonging to him on board the ſhip, and for which he gave a reſpondentia bond in the common form. The ſhip and goods were conſumed by fire and totally loſt.—On this caſe, the queſtion was, whether the plaintiff could recover the amount of his reſpondentia intereſt, upon this policy on *goods*.—On the part of the plaintiff was cited the ſtat. 19 *G.* II. c. 87, § 5, which pro-

In an action on a policy on *goods*, the plaintiff cannot give in evidence a reſpondentia bond as a proof of intereſt in the goods which the obligor has on board.

Glover v. *Black*, 3 *Bur.* 1394. 1 *Bl.* 399, 405, 422.

(*a*) Vid. *Emerig.* tom. 1, p. 299, 300, 301.—(*b*) Vid. 1 *Mag.* 8.

provides, "that money lent on bottomry or reſpondentia, in the *Eaſt India* trade, ſhall be lent only on the ſhip or goods, and inſured only by the *lender*; and that the borrower ſhall not recover on any inſurance more than the value of his intereſt in the ſhip or goods, *excluſive* of the money borrowed; and that, if this do not amount to the ſum borrowed, he ſhall be reſponſible to the lender for ſo much as he has not laid out on the ſhip or goods, with intereſt, inſurance, and all other charges." And it was argued from thence, that reſpondentia intereſt was inſurable as goods, *eo nomine*, becauſe one is made the meaſure of the other; and the inſurer always conſiders reſpondentia as goods, ſince he allows the bond itſelf to be the only proof of intereſt neceſſary, and never inquires after the value of the goods.—On the part of the defendant it was inſiſted, that the lender of money upon reſpondentia, had not, like a mortgagee, an intereſt in the goods of the borrower on board; for the property and poſſeſſion both remained in the borrower; and therefore reſpondentia ought to be inſured *nominatim*, and ſpecifically. That if an inſurance on goods entitled the inſured to recover on a reſpondentia intereſt, the inſurer would be liable to be defrauded: For if the ſhip came home ſafe, the inſured would be entitled to a return of premium, upon ſhewing, *that he had no goods on board*; but in caſe of loſs, he might claim as he then did, upon his reſpondentia intereſt.—The court were unanimouſly of opinion, that a reſpondentia bond was not evidence of an inſurable intereſt in the goods on which the money was lent.—Lord *Mansfield*, in delivering the judgment of the court, ſaid; —"At the trial of this cauſe, and ſince, I have leaned as much as poſſible to ſupport this inſurance; becauſe it appeared to have been made in this form, not through deſign, but merely by a ſlip, in not inſerting the word reſpondentia. To be ſure, the ſtat. 19 *G.* II. c. 37, § 5, does not not conſider the owner of the goods as having a right to inſure for more than the ſurplus value of the goods, above the money borrowed on reſpondentia. To many purpoſes the reſpondentia creditor has a lien on the goods:

goods: But we are ſatisfied that this act never meant to alter the manner or form of inſurances: It only meant to prevent wagering policies. The act itſelf deſcribes the inſurance by the creditor to be on the *money lent*, and leaves it upon the practice. Now, in practice, bottomry and reſpondentia have always been conſidered as a particular ſpecies of inſurance, and have taken a particular denomination. All the forms expreſs the inſurance to be on bottomry or reſpondentia: Nor is there a *dictum* that reſpondentia can be inſured under the denomination of *goods*. It would be very dangerous, therefore, to eſtabliſh a precedent to the contrary; ſince the conſequence may be bad, and introductive of frauds, though we cannot now ſee the particular mode of them. The ground of our determination is, that, by the cuſtom of merchants, reſpondentia is inſured under a ſpecial denomination. But we by no means ſay, that under an inſurance on goods at large, a man may not be permitted to give in evidence a mortgage or other ſpecial lien."

An exception to this rule.

Yet the uſage of a particular trade may ſanction a departure from this rule.—As where the captain of an *Eaſt Indiaman* made an inſurance on "*goods, ſpecie, and effects* on board:" He was permitted to recover for money laid out for the uſe of the ſhip in the courſe of the voyage, and for which he charged *reſpondentia intereſt*; it being proved that this ſort of intereſt was always inſured in this manner in the *Eaſt India* trade.

Gregory v. *Chriſtie*, B. R. Tr. 24 *G.* III. ſup. 94.

The maſter's clothes, the ſhip's proviſions, and goods laſhed to the deck, cannot be inſured as goods.

There are even certain articles, which, though they may be properly called goods, yet are not comprehended under the general denomination of goods, wares, and merchandizes in the policy; and therefore the inſurer is not liable for any loſs upon theſe articles, unleſs they be ſpecifically named: Such are the maſter's clothes, and the ſhip's proviſions, which are conſidered as a part of the furniture of the ſhip.(*a*)—Neither are goods laſhed to the deck comprehended under the name of goods, unleſs they

Vid. ſup. ch. 3. § 5.

(*a*) Vid. *Brough* v. *Whitmore*, 4 T. R. 206, ſup. 188.

they be particularly deſcribed; becauſe they are expoſed to greater danger than goods uſually are, and conſequently the premium for inſuring them is greater. (*a*)

Money, jewels, or bullion, may be inſured under the denomination of goods.

It has been queſtioned whether foreign coin, jewels, or bullion, could be inſured under the general denomination of goods, wares, and merchandizes. (*b*) It certainly appears from *Magen*'s collection of foreign ordinances, (*c*) that in ſome places there are poſitive regulations which require that gold and ſilver, whether coined or uncoined, and jewels, ſhall be particularly ſpecified in the policy. In *France*, theſe articles may be inſured under the denomination of goods and merchandizes, provided the tranſport of them be not prohibited. (*d*) And with us it is uſual to inſure them generally as merchandize; but it is not underſtood that the inſurer is liable for the riſk of a clandeſtine exportation. (*e*)

But the inſurer is not liable for the riſk of a clandeſtine exportation of theſe articles.

Jewels, &c. worn by perſons on board, are not included in a policy on goods.

A diſtinction has generally been made between money, jewels, rings, trinkets, &c. which are a part of the *cargo*, as articles of commerce, and ſuch as are merely *perſonal*, and are not meant to be diſpoſed of as ſuch. The jewels and ornaments which are worn by perſons on board, and which are not conſidered as forming a part of the cargo, nor liable to contribute to a general average, (*f*) would not be conſidered as included in a general policy on goods. (*g*)

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(*a*) R. *Roſs* v. *Thwaites*, at N. P. *Park* 20. poſt. c. 17, § 5.—(*b*) *Park* 22.—(*c*) 2 *Magens*, 71, 89, 131, 187.—(*d*) *Emerig.* tom. 1, p. 297.—(*e*) 1 *Magens*, 10. Vid. *Da Coſta* v. *Frith*, 4 *Burr.* 1966, ſup. 108.—(*f*) Vid. inf. ch. 13, § 6.—(*g*) Aſſecurans merces in talem navem immiſſas, intelligitur aſſecurare pecuniam, aurum, argentum, gemmas, margaritas, et annulos, in dicta navi exiſtentes, quæ omnia, *appellatione mercium*, in navem immiſſarum, comprehenduntur, licet expreſſa non fuiſſent. *Santerna* declarat quod ſi pecuniæ, margaritæ et annuli erant deſtinati ad vendendum, vel mercandum alias merces, tunc appellatione mercium veniunt, et in aſſecuratione comprehenduntur, et loco mercium habentur: Vocat dictas res merces, cum occaſione earum habeat locum contributio, ſicut aliarum rerum, ne in iſtis aſſecurationibus mercatorum potius appices juris quam veritas obſervari

An inſurance on a ſhip does not comprehend both ſhip and cargo: And therefore if a merchant inſure a ſhip generally, and ſhe then happen to be laden, the inſurer, in caſe of loſs, ſhall anſwer only for the ſhip, but not for the goods. (*a*)

An inſurance on a ſhip does not cover the cargo on board.

4. *A deſcription of the Voyage, with the Commencement and End of the Riſk.*

Every fact and circumſtance relating to the contract of inſurance muſt be ſtated with the moſt ſcrupulous regard to truth. The voyage inſured muſt therefore be truly and accurately deſcribed in the policy; namely, the time and place at which the riſk is to begin, the place of the ſhip's departure, the place of her deſtination, and the time when the riſk ſhall end, whether on goods, or on the ſhip. If a blank be left for the place either of the ſhip's departure or deſtination, the policy will be void for the uncertainty.—As if a ſhip be inſured from *London* to ; this blank being left to prevent an enemy's learning the place of the ſhip's deſtination; if the ſhip in her voyage be caſt away, the inſured ſhall not recover his loſs on this policy, though there were private inſtructions for the ſhip's port of deſtination. (*b*)

The voyage, with the commencement and end of the riſk muſt be preciſely deſcribed.

If a blank be left either for the place of departure or of deſtination, the policy will be void.

In our ordinary policies, the continuance of the riſk on *goods* is generally expreſſed to be *from the loading thereof on board the ſhip*, and to continue '*until the ſame be diſcharged and ſafely landed*,' at the port of delivery:—Upon the ſhip, on an outward voyage, it is ſometimes from *her beginning to load*, at ſome particular place, or *at and from* ſuch place; ſometimes *from a particular day*. On a homeward voyage, it is generally made to commence *on the ſhip's arrival* at a particular place abroad, or at and from ſuch place; and it continues *till ſhe arrives* at her place of deſtination,

How the commencement and end of the riſk are uſually ſpecified.

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obſervari videantur: Et tandem, quia large comprehenduntur omnes res quæ ſunt deſtinatæ ad negotiandum et facit etiam quod confiſcatio mercium navis extenditur etiam ad pecuniam numeratam. *Roccus*, not. 17.—(*a*) *Molloy*, b. 2, c. 7, § 18. *Roccus*, n. 16.—(*b*) *Molloy*, b. 2, c. 7, § 14.

deſtination, "*and is there moored 24 hours in good ſafety.*"—Certain proviſions are often added to enable the ſhip to touch, ſtay, trade, &c. at certain places out of the direct courſe of the voyage, without being guilty of a deviation.

If the policy be made for a term, it muſt not exceed 12 months.

Sometimes privateers and veſſels which are conſtantly employed in the coaſting trade, are inſured for a term. But, by the ſtat. 35 *G.* III. c. 63, § 12, this term muſt not exceed 12 calendar months.—If it exceed that time, the policy will be void.

The commencement and end of the term muſt be ſpecified.

In policies for time, the commencement and end of the term ſhould be diſtinctly ſpecified. If, however, that ſhould not be ſo preciſely ſtated as it ought to be, it will be ſufficient if it can be collected from the conſtruction of the policy, and the intention of the parties.

A liberty to cruiſe for ſix weeks, means ſix ſucceſſive weeks.

If a letter of marque be inſured from *Liverpool* to *Antigua*, with liberty to cruiſe for ſix weeks; but no time is fixed for the commencement of the cruiſe: This is not to be underſtood as giving a power to cruiſe for ſix weeks at different periods, but only for one uninterrupted period of ſix ſucceſſive weeks. (*a*)

Vid. inf. ch. 12, § 1.

Though the deſcription of the voyage be literally true; yet if it be calculated to induce a falſe concluſion, the policy will be void.

Even though the *termini* of the voyage inſured be truly ſtated; yet, if the wording of the policy be calculated to induce in the inſurer a belief that the *voyage* originally began at the port, where, by the policy, the *riſk* is to begin, when in truth the ſhip had brought her cargo from another port; this will be a falſe deſcription of the voyage, and the policy will be void.

A ſhip takes in her cargo at *Leghorn*, and ſails to *Genoa*, and an inſurance is made on the goods from *Genoa* to *Dublin*, "*to begin from the loading.*"—The policy is void; this being a falſe deſcription of the voyage, calculated to induce the

As where goods were inſured, "At and from *Genoa* "to *Dublin*; the adventure to begin *from the loading to equip* "*for the voyage.*"—The cargo, conſiſting of pot-aſh, verdigreaſe, and other periſhable commodities, was put on board at *Leghorn* on the 10th of *Auguſt*, and the veſſel loſing her convoy, put into *Genoa* on the 13th of *Auguſt*, and lay there till the 5th of *January*, near five months, and then ſailed. The inſurance was effected on the 20th of *January*,

(*a*) R. *Syers* v. *Bridge*, *Doug.* 509, inf. c. 12, § 1.

January, at which time theſe circumſtances were known to the inſured, but not communicated to the underwriters. The ſhip in her voyage met with a ſtorm, which conſiderably damaged her cargo, and an action was brought for a partial loſs. On the trial it appeared that, by the uſage, it was material to acquaint the underwriter, whether the inſurance was to begin at the *commencement* or the middle of the voyage.—There was a verdict, however, for the plaintiff; but which was afterwards ſet aſide, and a new trial granted; the court being clearly of opinion, that from the terms of the policy, it muſt be implied that *Genoa* was the *port of loading*, which was not true; and this being a miſrepreſentation (*a*) of a material circumſtance, the underwriter had a right to ſay that this was not his contract.

underwriter to believe that *Genoa* was the port of loading.

Hodgſon v. *Richardſon*, 1 *Bl.* 463.

So, if the port or ports of the ſhip's deſtination be untruly ſet forth in the policy, the contract will be void. And this is not like the caſe of an intended deviation; for there can be no deviation from a voyage which was never in the contemplation of the party.

The port or ports of the ſhip's deſtination muſt be truly ſtated.

As where a ſhip was inſured, "At and from *Mary-*"*land* to *Cadiz*," and was cleared from *Maryland* to *Falmouth*, and a bond given that certain enumerated goods ſhould be landed in *Britain*, and all the other goods in the *Britiſh* dominions. An affidavit of the owner, and the bills of lading ſhewed that the ſhip was bound "to *Falmouth* and a market;" and there was no evidence that ſhe was deſtined for *Cadiz*. She was taken in *Cheſapeak Bay*, in the courſe from *Maryland* both to *Cadiz* and *Falmouth*, before the dividing point. Many circumſtances led to a ſuſpicion that ſhe was, in truth, deſigned for neither place, but for the port of *Boſton*, to ſupply the *American* army; but there was not ſufficient direct evidence of that fact.—The court determined that the plaintiff could not recover in this cauſe.—Lord *Mansfield* ſaid; —"The policy, on the face of it, purports to be a voyage

A ſhip, inſured from *A.* to *B.* appears by her papers to have had a different voyage in view, and is taken in the track to both places, before the dividing point.—This is no deviation, but a different voyage, and the inſurers are diſcharged.

Wooldridge v. *Boydell*. *Doug.* 16.

(*a*) This is not ſo properly a miſrepreſentation, as a falſe deſcription of the voyage inſured.

voyage to *Cadiz*. *All contracts of inſurance muſt be founded in truth, and the policies framed accordingly.* When the inſured intends a deviation from the direct courſe, it is always provided for, and the indemnification adapted to it. In all caſes of deviation, the *termini a quo* and *ad quem*, are certain and the ſame. Here the voyage was never intended for *Cadiz*."—Mr. Juſtice *Buller* ſaid;—"There cannot be a deviation from a voyage which never exiſted. The weight of the evidence is, that the voyage was never deſigned for *Cadiz*."

Freight is inſured from *A.* to *B.* but the goods, in truth, are intended to be ſent to *C.*; the policy is void.

Murdock v. *Potts* at N. P. after Trin. 1795, *Park* 299.

So alſo, where an inſurance was made on *freight*, "At and from *Bourdeaux* to *Virginia*."—It appeared in evidence, that the goods were, in fact, to be carried to *St. Domingo*, and that the ſhip was only to call at *Norfolk* in *Virginia* for orders:—Lord *Kenyon* was of opinion, that the underwriters muſt ſuppoſe that the goods were conſigned to *Virginia*. But the freight payable, being for the carriage of them to *St. Domingo*, it was different from the freight inſured; and though the ſhip was to call at *Virginia*, that did not alter the caſe.—The plaintiff was nonſuited, and no application was made to ſet the nonſuit aſide.

Whatever may have been the original intention of the inſured, if the ſhip in fact, ſail on a voyage different from the voyage inſured, the policy is diſcharged.

A ſhip is inſured from a certain day, from *A.* to *B.* and before the day ſhe ſails on a different voyage, the policy is diſcharged.

Wey v *Medigliani*, 2 T.R. 30.

And whatever may be the *intention* of the inſured at the time the inſurance is effected, if, in fact, the ſhip ſail on a voyage different from the voyage inſured, the policy is diſcharged; not, perhaps, on the ground of a wilful miſrepreſentation, but becauſe the ſhip never ſailed on the voyage deſcribed in the policy, and there is no inception of the riſk inſured againſt.

Thus:—A ſhip was inſured, "At and from the 20th of *October* 1786, from any ports in *Newfoundland* to *Falmouth*, or her ports of diſcharge in *England*, with liberty to touch at *Ireland*, and any ports in the *Channel*."—On the firſt of *October*, the ſhip left *Newfoundland*, went to the *Banks*, fiſhed there till the 7th, ſailed on that day from thence for *England*, and in that voyage was loſt on the 30th of *November*.—In this caſe the queſtion was, whether the policy ever attached, and whether it was not diſcharged, the ſhip never having ſailed on the voyage

voyage inſured.—On the part of the inſured, it was contended, that though the riſk of the inſured began from the 7th, yet, as the riſk of the underwriters was not to commence till the 20th, it could make no difference to them; and, in fact, their riſk was conſiderably leſſened, as the ſhip was part of her way home before the policy could attach. But the court decided, that as the ſhip, inſtead of ſailing for *England*, the voyage inſured, ſailed *to the Banks*, which was a different voyage, the policy was diſcharged.

But, in the following caſe, which was determined ſince the above, it has been holden, that though there be a *previous deſign* to touch at a port out of the uſual courſe of the voyage inſured, and the ſhip be even furniſhed with clearances for that port; yet, if the *termini* of the intended voyage be the ſame as thoſe of the voyage mentioned in the policy, this ſhall be conſidered only as an *intention to deviate*.

But though there be a previous deſign to touch at a place out of the courſe of the voyage; yet, if the *termini* of the voyage be the ſame, this ſhall only be deemed an intention to deviate.

A ſhip, inſured from *A.* to *B.* ſails with a *deſign* to touch at *C.* and before the dividing point, is loſt.—The inſurers are liable.

Kewley v. *Ryan*, 2 *H. Bl.* 343.

An inſurance was made on goods, "at and from *Grenada* to *Liverpool*, in ſhip or ſhips:"—It appeared that the ſhip, on board of which the goods were laden, ſailed for *Liverpool*, but with a deſign *formed before the commencement of the voyage*, (as appeared by her clearances, and was admitted on all ſides,) to touch at *Cork* in her way; but was totally loſt before ſhe arrived at the dividing point.—Upon this caſe, (*a*) it was determined that, the inſured was entitled to recover.—For the *termini* of the intended voyage being really the ſame as thoſe deſcribed in the policy, it was to be conſidered as the ſame voyage; and a *deſign* to deviate, not effected, would not determine the policy. (*b*) That in *Wooldridge* v. *Boydell*, (*c*) it appeared that there was no intention that the ſhip ſhould go to *Cadiz* at all; and in *Way* v. *Modigliani*, (*d*) the ſhip did not, when ſhe left the port in *Newfoundland*, ſail for *England*, but went to fiſh on the

(*a*) There were other points in this caſe for which it is cited, inf. c. 11, § 4.—(*b*) Per *Holt*, C.J. in *Green* v. *Young*, at N. P. 2 Lord *Ray*. 840, 2 *Salk*. 444.—(*c*) Sup. 229.—(*d*) Sup. 230.

the *Banks*. Here the ſhip was bound for *Liverpool*, though ſhe had alſo clearances for *Cork*.

Diſtinction between an intended deviation and a different voyage.

According to the doctrine of Lord *Mansfield*, in *Wooldridge* v. *Boydell*, (*a*) a deviation is a departure from the uſual courſe of the voyage inſured; not in conſequence of any avowed deſign, or any orders previouſly given to the captain, but from an after thought conceived during the voyage. If, therefore, a ſhip be inſured from *A.* to *B.* and, *before her departure*, the inſured determine that ſhe ſhall call at *C.*, which is out of the uſual courſe of the voyage from *A.* to *B.*:—This, according to the above doctrine, cannot ſo properly be ſaid to be an *intended deviation* as a *different voyage*; namely, a voyage from *A.* to *C.* and *B.* And in the argument of the caſe of *Kewley* v. *Ryan*, the caſe of *Stott* v. *Vaughan*, was mentioned,

Stott v. *Vaughan.*

which was an action on a policy on the very ſame ſhip, tried before Lord *Kenyon* at *Guildhall* in Hil. Vac. 1794, in which his Lordſhip nonſuited the plaintiff, on the ground that the voyage intended was not the voyage deſcribed in the policy.

If the ſhip has liberty in the policy to touch at a place where it is not intended ſhe ſhall go, yet the policy will be good.

But if, for particular reaſons, a place be mentioned in the policy where the ſhip ſhall have liberty to touch, when in fact it is not intended that ſhe ſhall touch there, but proceed directly to her port of deſtination, this will not avoid the policy; for the inſured may ſhorten the voyage, and diminiſh the riſk. (*b*)—As where a ſhip was inſured from *London* to *Nantz*, *with liberty to touch at* Oſtend; and ſhe cleared out for *Oſtend* only, though it was deſigned that ſhe ſhould proceed immediately to *Nantz*, with bills of lading, purporting to be made out at *Oſtend*, as if her cargo had been ſhipped there, in order to enable the ſhippers to import *Engliſh* goods into *Nantz*, at *Oſtend* duties, and alſo to ſave the light-houſe duties going down the *Channel*.—This, being a conſtant practice, and known to all concerned in this trade, it was held to be no fraud on the underwriters; and that the policy was good.

Planché v. *Fletcher*, *Doug.* 238, ſup. 69.

If

(*a*) *Doug.* 18.—(*b*) Vid. *Emerig.* tom. 2, p. 52.

If, from a certain point in the voyage inſured, there be ſeveral tracks which lead to the place of deſtination, with certain advantages and diſadvantages attending each; and, at that point, the captain has uſually been at liberty to elect, according to circumſtances, which of the courſes he ſhould take. If the ſhip inſured ſail, *with orders from the inſured, to take one particular track*, in order to touch at a port in that track, this ought to be ſtated in the policy, otherwiſe it will be void; for the inſurer is entitled to the advantage of the captain's judgment in electing, at the moment he arrives at the dividing point, which of the tracks it will be beſt for the ſhip to purſue, under the then exiſting circumſtances. This point will be found determined in the following caſes.

If from a certain point in a voyage, there be ſeveral tracks, of which the captain uſually elects which he will purſue; but a particular track is *preſcribed to him* by the inſured; this ſhould be mentioned in the policy, otherwiſe it will be void.

The ſhip *Arethuſa*, was inſured, "At and from *London* "to *Jamaica*."—In an action upon this policy, for a loſs by capture, the defendant paid the premium into court, and reſiſted the demand on the ground that the policy was void, as not containing a true deſcription of the voyage intended.—On the trial, it appeared that the ſhip was cleared out for *Jamaica* only, but ſailed *with directions* to the captain to touch at *Cape Nicola Mole* in *St. Domingo*, in order to land ſome ſtores there, purſuant to a charter-party, and afterwards to proceed to *Jamaica*.—*St. Domingo* lies in the track to *Jamaica*, and conſequently the courſe from *London* to *Cape Nicola Mole* and to *Jamaica* is, to a certain point, the ſame. From that point there are three tracks which a ſhip bound to *Jamaica* may take; one immediately to the ſouthward of *St. Domingo*; another further ſouth; and a third to the northward of that iſland. In this laſt, after the ſhip had paſſed the dividing point of the three ſeveral courſes, but before ſhe had reached the ſubdividing point of the continuing courſe to *Jamaica*, and that leading into the port of *Cape Nicola Mole*, ſhe was captured. Of the three ſeveral tracks to *Jamaica*, from the dividing point, which the ſhip paſſed, it appeared that thoſe to the ſouthward of *St. Domingo*

A ſhip inſured from *A.* to *B.* ſails with directions to touch at *C.* an intermediate point. From a certain point in the voyage, there are three tracks to *B.*; one by the way of *C.*, the other two by different courſes,—and there are certain advantages and diſadvantages attending each, ſo that the captain muſt elect according to circumſtances which courſe he will purſue. The ſhip takes the track by *C.* in order to touch there, but is captured before ſhe comes to the point where ſhe muſt

have turned into the track to *B.* by the way of *C.* The inſurer is diſcharged becauſe he was entitled to the advantage of the captain's judgment in electing which of the tracks it was beſt to purſue, when he came to the firſt dividing point.

Middlewood v. *Blake*, 7 T. R. 162.

Domingo were the moſt uſual, eſpecially in time of peace, and were the ſafeſt navigation; that the other, to the northward, was the ſhorteſt, but more difficult, navigation, but was ſometimes preferred in time of war, by thoſe who were acquainted with it, more eſpecially in this war, becauſe great part of the iſland of *St. Domingo*, including *Cape Nicola Mole*, being in poſſeſſion of the *Britiſh* forces, there was leſs riſk to be apprehended from privateers. But which of the three courſes was the moſt advantageous to be purſued, in any particular inſtance, depended upon circumſtances, upon which it was proper for the captain to exerciſe his judgment at the time. It was not pretended that the captain had in fact exerciſed any ſuch judgment, in ſelecting the courſe he had taken; it being evident that he had adopted it as the moſt direct and proper one to be taken for the purpoſe of going into *Cape Nicola Mole*, whither he was then bound.—Lord *Kenyon*, before whom the cauſe was tried, was of opinion that the defendant was diſcharged under theſe circumſtances; becauſe, at the time when the ſhip was captured, ſhe was bound to a different place from that for which ſhe was inſured; and with a view to which, the captain, under compulſion of his orders, had taken this particular track, and was not left at liberty to exerciſe his judgment at the dividing point, for the benefit of all concerned, as the inſurers had a right to inſiſt upon.—The jury accordingly found a verdict for the defendant, being, as they ſtated, unanimouſly of opinion, "that the "*concealment* (*a*) of the intention to go to *St. Domingo* "vitiated the policy."—Upon a motion for a new trial, it was inſiſted on the part of the plaintiff, that where the *termini à quo* and *ad quem* remain the ſame, an intended deviation

(*a*) This cannot ſo properly be called a *concealment*, as a defective deſcription of the voyage in the policy. A concealment is generally underſtood to mean the withholding of ſome information material for the inſurer to know, but not neceſſary to be inſerted in the policy. But the deſcription of the voyage inſured muſt always be contained in the policy: nor do I apprehend that any *viva voce* communication would ſupply a defect in that deſcription.

deviation ſhall not vitiate the policy, if the loſs happen before the ſhip arrives at the dividing point.—The court, however, were unanimouſly of opinion, that the plaintiff was not entitled to recover.—Lord *Kenyon* ſaid, "I will not now inquire whether the caſes cited were, or were not, properly decided; though, perhaps, if this were *res integra*, I might have entertained ſome doubts. It is ſufficient that thoſe caſes have been decided, and if the opinion which I gave at the trial tended to ſhake their authority, I would abandon it: But it ſeems to me that our deciding in favour of this defendant will not diſturb any of the authorities. At the trial ſix witneſſes, who had gone many voyages to *Jamaica*, were examined on the part of the plaintiff, reſpecting the common courſe of the voyage, two of whom had never taken the northern paſſage, and the other four ſaid that the ſouthern was the moſt uſual; and that, at all events, the captain ought to exerciſe his diſcretion in each particular caſe, whether he ſhould take the one courſe or the other. When this policy was ſubſcribed, it muſt be taken for granted that the defendant knew what was the common courſe of the trade, and expected that the moſt expedient courſe would be purſued by the captain, acting on the emergency of the occaſion: But in fact that diſcretion of the captain was taken away in this inſtance, and on that I formed my opinion. That was a moſt important fact, and ought to have been communicated to the underwriters." Mr. Juſtice *Aſhurſt* and Mr. Juſtice *Groſe* concurred in theſe ſentiments, both founding their opinions on the want of a full diſcloſure of the particular courſe the ſhip was to take, as being a circumſtance that might have materially varied the riſk.—Mr. Juſtice *Lawrence* ſaid,—"When the motion for a new trial was made, I was inclined to think that this caſe fell within the authority of the ſeveral caſes cited by the plaintiff's counſel; and that, as the ſhip was taken in the courſe of her voyage to *Jamaica*, without ſtopping at *St. Domingo*, the plaintiff was entitled to recover: But, in the courſe of this diſcuſſion, I have changed my opinion. The principle on which thoſe caſes have

have been determined is, that when the ſhip is taken before ſhe comes to the dividing point, the underwriters run no additional riſk by the captain's intention to deviate afterwards; and therefore it is to be conſidered as if no ſuch intention had been formed. Now if, in this caſe, the ſhip had been captured before ſhe took the northern courſe, I ſhould have thought that the plaintiff would have been entitled to recover; for, in that caſe, the ſhip would have run no additional riſk: But here ſhe ſailed for *Jamaica*, having a charter-party to ſtop at *St. Domingo*; and when ſhe came to the dividing point, which I conſider, in this caſe, to be that where ſhe begun to take the northern courſe, the ſhip was ſubjected to a riſk for which the underwriters did not make themſelves reſponſible; for at that moment, they were entitled to have the benefit of the captain's judgment, whether he would go to the north or to the ſouth. If it had appeared that the captain had really exerciſed his judgment, and had taken the northern courſe, as in his opinion, the beſt, at that time, without being influenced by the charter-party to go to *St. Domingo*, I ſhould have thought that a new trial ought to be granted: But I underſtand that he took this courſe, not after exerciſing his judgment, but becauſe he was bound to go to *Cape Nicola Mole*; and, therefore, there is no ground for ſending this caſe to a new trial, though the jury have decided for the plaintiff on another ground, which, in my opinion, is not tenable." (*a*)

5. *The Perils inſured againſt.*

The various perils againſt which the inſured means to be protected, muſt be diſtinctly enumerated in the policy.

(*a*) The ground on which the jury decided was, that the not diſcloſing to the underwriters the neceſſity of the ſhip's going to *Cape Nicola Mole*, was a concealment which vitiated the policy. (vid. Sup. 234.) That ground ſeems to be the principal foundation of the opinions delivered by the other three

icy. Theſe are generally expreſſed in a form of words which has been long in uſe; and being dictated by the anxiety which is natural to perſons who have great objects at ſtake, have been ſo multiplied, and are now ſo comprehenſive, that they afford full protection againſt every accident or misfortune that can poſſibly happen in the courſe of any voyage, and for which it is meant that the inſurer ſhall be anſwerable.

There are, however, as we have already ſeen, certain loſſes for which it is never meant that the inſurer ſhall be anſwerable, being imputable to the owners of the ſhip, or to the maſter and mariners whom they employ, rather than to the perils of the ſea. Such are injuries occaſioned to goods by bad ſtowage, by being expoſed to wet, by theft, and embezzlement of the maſter or mariners, &c.

There are certain loſſes which are not comprehended in the uſual words of the policy. Vid. ſup. ch. 5, § 4.

In all our policies are inſerted the words, '*loſt or not loſt*,' by which the inſurer takes upon himſelf, not only the riſk of future loſs, but alſo the loſs, if any, that may already have happened. It is ſaid, (*a*) that this clauſe is peculiar to *Engliſh* policies. But the ſame thing is expreſſed in the *French* policies by the words, "*ſur* "*bonnes ou mauvaiſes nouvelles.*" (*b*)

The clauſe '*loſt or not loſt*,' is always ſettled in our policies.

It is not peculiar to *Engliſh* policies.

This clauſe, it is probable, was originally inſerted in policies, only in caſes where there was reaſon to fear that a loſs had already happened; and in ſuch caſes the inſertion of it neceſſarily induced the payment of a higher premium. But it has long been inſerted in every policy,

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three judges. And indeed it would ſeem that the voyage intended was not the voyage inſured. Vid. ſup. 232, where the difference between an *intended deviation*, and a *different voyage* is ſhewn. In this caſe the defendant paid the premium into court, which plainly ſhews that he, or thoſe who conducted his defence, meant to reſiſt the plaintiff's claim, on the ground that the policy was void in its original; and not on that of a *deviation*, which only diſcharges the inſurers from the time it takes place, but does not entitle the inſured to a return of premium. —(*a*) *Park*, 25, 5 *Bur.* 2803.—(*b*) Vid. *Emerig.* tom. 2, p. 143.

policy, as a matter of courſe. The reaſon aſſigned by *Roccus* why this clauſe is thought unneceſſary, and therefore not inſerted in the policies of ſome countries, is, that the fate of the voyage being unknown, will not prejudice the inſurance. (*a*)

Policies with this clauſe are not deemed wagers.

Natural law would require that the ſubject matter of an inſurance, like that of a ſale, ſhould exiſt at the time of the contract: But municipal law adds, that although the thing inſured may poſſibly no longer exiſt, but that it had periſhed before the contract was made, yet unleſs the inſured or his agents knew this, at the time the contract was made, the thing inſured is, by a ſort of fiction of law, founded on the good faith of the inſured, ſuppoſed ſtill to exiſt, ſo as to be a proper ſubject of inſurance, and not be conſidered as loſt till intelligence of the loſs arrives. The inſurance, in ſuch caſe, is made, as it were *nunc pro tunc*. The contract is preſumed to have had its exiſtence while the ſubject matter of it was in being, and before the time when the riſk commenced. Upon this ground, and from the neceſſity of the caſe, policies, with this clauſe, are deemed legal contracts, and not wagers; nor can they, when rightly underſtood, be adduced as a precedent to authorize wager inſurances.

Though this clauſe is not inſerted in ſome of the foreign policies, yet it muſt, in many caſes, be neceſſarily implied in the contract, otherwiſe it would be impoſſible for the merchant to be inſured againſt riſks which are already run; and againſt which it is indiſpenſably neceſſary for his ſafety that he ſhould ſometimes be inſured. For it often happens, in the caſes of *middle voyages* in diſtant parts of the world, and in homeward voyages, that the riſk is wholly, or in part, run before any inſurance can be effected.

It does not make the contract more hazardous.

It has been ſaid, that inſurances, *loſt or not loſt*, are 'certainly very hazardous;—and that the premium is 'great in proportion.'(*b*)—Why an inſurance here is more hazardous, only becauſe it is made after the riſk has been begun

(*a*) *Roccus*, h. t. n. 175.—(*b*) *Park*, 25, vid. *Molloy*, 62, c. 7, § 5.

begun or even ended, in a diſtant part of the world, is not very obvious. Fraud out of the caſe, it would ſeem that if there be any difference, inſtead of being the ground of an increaſe of premium, it is rather in favour of the inſurer, who may reaſonably be ſuppoſed to ſpeculate better upon the occurrences of the time paſt, even in diſtant parts of the world, than upon thoſe of the time to come. An underwriter would be better able, at leaſt in time of war, to eſtimate the riſk of the voyage from the coaſt of *Africa* to *Jamaica*, two months after it was begun, than two months before.

6. *The Powers of the inſured in caſe of Misfortune.*

It was formerly doubted whether the inſured could uſe his endeavours to recover the goods which had been loſt, or in preſerving ſuch as had been ſaved, without waving his right to abandon. (*a*) To obviate this doubt, a clauſe was introduced into the policy to enable the inſured in caſe of any loſs or misfortune, to employ all neceſſary means for the defence, ſafeguard, and recovery of the goods or ſhip inſured, without prejudice to the inſurance, and at the charge of the inſurers, to which they bind themſelves to contribute in proportion to their reſpective ſubſcriptions.

7. *The Promiſe of the inſurers, and their receipt for the Premium.*

The next clauſe in the policy is that by which the inſurers bind themſelves to the inſured for the true performance of their contract, and confeſs themſelves paid the conſideration or premium, by the inſured, after the rate ſpecified.

It is true that, in practice, the premium is not always paid when the policy is underwritten. Inſurances, as has been already obſerved, are generally effected by the intervention of brokers, and open accounts are uſually kept between them and the underwriters, in which they make themſelves debtors for all premiums. Indeed it is laid down that, by the uſage of trade, the inſurer is to look

The receipt for the premium is only to preclude the inſurers from objecting the want of conſideration.

(*a*) *Caſaregis*, Diſc. 3, n. 14.

look to the agent who is employed to effect the policy for his premium. (*a*)

Sometimes the credit is given to the insured himself. If there be no express agreement, it would seem that the agent or broker is *prima facie* liable. Perhaps, in such case an action would lie against either, unless the principal has paid the premium to the agent; in which case, the writers on this subject are of opinion that the agent is alone responsible. (*b*)—But whichever is liable, the insurer may recover the premium, and *indebitatus assumpsit* will lie for it, (*c*) notwithstanding the formal acknowledgment of the receipt of it in the policy, which is not inserted there as conclusive evidence of the actual payment of the premium, but to preclude the necessity of proving it in case of loss.

Indebitatus assumpsit will lie for the premium, notwithstanding the receipt of the insurer.

The payment or non-payment of the premium therefore can have no effect upon the insurance. Every insurer may insist on being paid the premium before he subscribes the policy; but having once subscribed it, and given credit for the premium, no matter to whom, he shall not afterwards be at liberty, when a loss has happened, to object the want of consideration for his promise.

The non-payment of the premium cannot affect the validity of the contract.

There is no fixed rule to ascertain the rate of the premium in any case. This must always depend on the agreement of the parties; and therefore the premium, whatever it may be, is always reputed to be just and fair, if there be no fraud or surprise on either side. If the nature of the risk be fairly and fully declared by the insured, the insurer can never dispute the payment of a loss, on the ground of the smallness of the premium. (*d*)

8. *The common Memorandum.*

This memorandum next follows, for the purpose of confining insurances to their only proper object, namely, an

(*a*) *Valin*, art. 3, h. t. p. 32. *Pothier*, n. 98. *Emerig.* tom. 1, p. 139.—(*b*) Vid. *Savary*, liv. 3, c. 2. *Emerig.* tom. 1, p. 148.—(*c*) R. *Jackson* v. *Colegrave*, Carth. 338.—(*d*) Vid. *Emerig.* tom. 1, p. 69.

an indemnity againſt real and important loſſes ariſing from the perils of the ſea, and to obviate all ſubjects of litigation about trivial loſſes, and loſſes ariſing from the periſhable quality of the goods inſured. For this purpoſe, it is now, by this memorandum, conſtantly ſtipulated in all our policies, that in the caſe of certain enumerated articles, of a quality peculiarly periſhable, the inſurer ſhall not be anſwerable for any partial loſs whatever; that, in the caſe of certain others, liable to partial injuries, but leſs difficult to be preſerved at ſea, ſhall only be liable for partial loſſes above five *per cent.*; and that, as to all other goods, and alſo the ſhip and freight, he ſhall only be liable for partial loſſes above three *per cent.* But there is an exception in this memorandum of all loſſes, however ſmall, of the nature of *general average*; or where the ſhip is ſtranded: But this laſt exception is only found in the policies of private underwriters. (*a*)

9. *The Date and Subſcription.*

The ſum inſured is, generally, placed after the ſignature, in the underwriter's hand-writing, and in words at length, not in figures which are eaſily altered or changed. But it is not indiſpenſably neceſſary that the ſum ſhall be ſpecified in the policy. An inſurer may bind himſelf to pay the value of the effects inſured, or a given proportion of it, without fixing that value in the policy. (*b*)

A policy of inſurance, like every other contract in writing, ſhould have a date. There are few inſtruments to which the true date is more neceſſary. This date, when compared with the dates of facts connected with the tranſaction, ſerves to diſcover whether there be reaſon to ſuſpect any fraudulent concealment, at the time of any of the ſubſcriptions to the policy.

The date is not inſerted in the body of the policy. For, as each ſubſcription to a policy makes a diſtinct contract, each

Each underwriter puts the date to his ſubſcription.

(*a*) Vid. ſup. c. 6, § 3, where the ſubject of this memorandum is fully conſidered.—(*b*) Vid. *Pothier*, h. t. n. 75. *Emerig.* tom. 1, p. 57.

each underwriter ſets down the day, month, and year of his own ſubſcription.

Practice in *France.*

This practice is preferable to that which prevails in *France*, where the firſt underwriter puts a date after his ſignature, and the reſt ſubſcribe without adding any date. At length the notary or broker cloſes the policy with the date of the firſt ſubſcription. This practice, as *Emerigon* juſtly obſerves, muſt afford frequent temptations to fraud; and he laments, that though great endeavours had been uſed to introduce the *Engliſh* practice, this had been without effect. (*a*)

10. *The Stamp.*

The laſt requiſite of the policy is that it be duly ſtamped.—Upon the ſubject of the ſtamp duties impoſed on this contract, it will be only neceſſary to inſert here the ſubſtance of the ſtat. 35 *G.* III. c. 63, and this will be done the more fully, becauſe it contains many regulations with which it behoves every perſon concerned in the buſineſs of marine inſurances to be well acquainted.

This act, which is declared not to extend to inſurances on lives, or againſt loſſes by fire, (*b*) and repeals all former ſtamp duties on marine inſurances, (*c*) impoſes 'On 'every policy of inſurance upon any ſhip, goods, or mer-'chandizes, or upon other property, the following duties, 'viz.—Where the ſum inſured amounts to 100 l. a ſtamp 'duty of 2s. 6d. and ſo progreſſively for every ſum of '100 l. inſured: And where the ſum inſured is leſs than '100 l. the like ſtamp of 2s. 6d.: And where it exceeds '100 l. or any progreſſive ſums of 100 l. each, by a frac-'tional part of 100 l. a like duty of 2s. 6d. for every 'ſuch fractional part: And where the premium *bonâ fide* 'paid, or contracted for, ſhall not exceed the rate of 10s. 'and the ſum inſured amounts to 100 l. a duty of 1s. 3d. 'and ſo progreſſively for every 100 l. and the fractional 'part of every 100 l. inſured. (*d*)

§ 1. A ſtamp duty of 2s. 6d. for every 100 l. inſured, and 2s. 6d. for every fractional part of 100 l. is impoſed on marine policies.

But where the premium does not exceed 10s. *per cent.* the duty ſhall be only 1s. 3d. *per cent.*

'Provided

(*a*) Vid. *Emerig.* tom. 1. p. 47.—(*b*) Sect. 2.—(*c*) Sect. 24.—(*d*) By 41 *G.* III. c. 10, all theſe duties are doubled. Vid. inf. 245.

'Provided that where the premium ſhall not exceed '10s. *per cent.* and the ſum inſured amounts to 200 l. or 'upwards, a ſtamp of 2s. 6d. may be uſed for every '200 l. inſured, inſtead of ſtamps of 1s. 3d. for every '100 l.'

§ 4. In ſuch caſe, the ſtamp may be 2s. 6d. for 200 l.

'Provided that where an inſurance is made on goods 'on board a ſhip ſpecifically named, on a homeward 'voyage, and the ſum inſured is found to exceed the in- 'tereſt by 1000 l. or upwards, where the duty is 1s. 3d. '*per cent.* or 500 l. where it is 2s. 6d. and upon oath 'of the true value of the intereſt, and on production 'of the policy within a month after landing the goods in '*Great Britain*, and on proof of the return of premium 'by the ſeveral underwriters, on account of ſuch ſhort 'intereſt, the commiſſioners may allow for the exceſs of 'duty, provided the policy be delivered to the commiſ- 'ſioners to be cancelled, and the intereſt inſured be not 'valued from the policy.'

§ 10. Where the ſum inſured on homeward voyages exceeds the intereſt of the inſured by 1000 l. where the ſtamp is 1s. 3d. *per cent.* or 500 l. where it is 2s. 6d. the exceſs of duty may be allowed.

'And every contract for any ſuch inſurance ſhall be 'printed or written, and ſhall be deemed a *policy of inſur-* '*ance*, in which the premium, the riſk inſured againſt, 'the names of the underwriters, and the ſums inſured, 'ſhall be ſpecified, in default whereof, every ſuch inſur- 'ance ſhall be void.'

§ 11. Every contract ſhall be deemed a policy which ſhews the premium, riſk, ſum inſured, and names of inſurers.

'And no policy upon any ſhip, or ſhare therein, ſhall 'be made for any certain term longer than 12 calendar 'months; and every policy for a longer term ſhall be 'void.'

§ 12. No policy upon a ſhip to be for a longer term than 12 months.

'And no ſuch inſurance, made in *Great Britain*, ſhall be 'given in evidence, or ſhall be good or available in law, 'unleſs ſtamped with the ſtamp to denote the rate of 'duty, or ſome higher duty, contained in this act; and 'it ſhall not be lawful to ſtamp any policy, after the in- 'ſurance ſhall be printed or written, under any pretence 'whatſoever.'

§ 14. No ſuch inſurance ſhall be available in law unleſs duly ſtamped, and no policy to be ſtamped after written or printed.

'And every perſon who ſhall make or effect, or pro- 'cure to be made or effected, any ſuch inſurance, or ſhall 'pay, or agree to pay, any premium thereon, or ſhall 'enter into any contract for ſuch inſurance, unleſs it be 'printed

§ 15. Any perſon effecting ſuch inſurance, or paying any premium, or contracting for ſuch inſurance,

unleſs duly ſtamped, ſhall forfeit 500 l. Brokers negociating ſuch inſurances to forfeit 500 l.

'printed or written, being firſt duly ſtamped with the proper ſtamp, or one of higher value, ſhall forfeit 500 l.; and 'all brokers, agents, &c. negociating ſuch inſurance, or 'printing or writing any agreement for ſuch inſurance 'before the ſame be duly ſtamped, ſhall alſo forfeit 500 l.

§ 16. And they ſhall not charge their brokerage.

'And it ſhall not be lawful for any broker, &c. negociating ſuch inſurance, to charge for brokerage, &c. or 'for any premium paid thereon, unleſs the ſame be printed 'or written and duly ſtamped; and every ſum ſo paid 'ſhall be deemed to be paid without conſideration.'

§ 17. Any perſon inſuring without a ſtamp, or concerned in any fraud to evade the ſtamp duties, to forfeit 500 l.

'And any inſurer or underwriter, who ſhall receive 'any premium, or pay any loſs, upon ſuch inſurance, unleſs 'it be written or printed and duly ſtamped; or any perſon 'who ſhall be concerned in any fraudulent device to evade 'the duties impoſed by this act, ſhall forfeit for every 'offence 500 l.'

§ 18. But the two inſurance companies may make agreements for inſurances on unſtamped labels, provided the policies be made out in 3 days after.

'But it being cuſtomary for the *London Aſſurance*, and '*Royal Exchange Aſſurance* Companies, to prepare a label, 'containing the heads of the inſurance propoſed, ſigned by 'the inſured, from which the policies are afterwards made; 'and it would be inconvenient to require the policies in 'all caſes to be immediately made out, it is provided, 'that the officers of thoſe corporations ſhall not be ſubject 'to any of the above penalties for making any agreement to 'inſure by ſuch unſtamped label, provided the day on 'which it was made be truly expreſſed in words at length, 'and a policy be made out in purſuance of the agreement, 'and according to one of the forms annexed to this 'act, (*a*) and duly executed and ſtamped within three 'office days from the date of the agreement.'

§ 13. Any alteration may be made in the policy, before notice of the end of the riſk, if the premium exceed 10s. *per cent.*

'Provided that any lawful alteration in the terms of 'the policy may be made after it has been underwritten, 'and that no additional ſtamp be required by reaſon of 'ſuch alteration; ſo that it be made before notice of the 'determination of the riſk originally inſured, that the 'original premium exceed 10s. *per cent.* that the prop-

'erty

(*a*) Vid. Appendix, No. I. II. III.

'erty of the thing insured remain the same, that the al-'teration shall not prolong the term insured beyond the 'period allowed, and that no additional sum shall be in-'sured by such alteration.'

This act also contains regulations for the providing paper, &c. at the public charge, and the distributing of stamped policies, where the sum insured is not under 10,000 l.—and for stamping paper, &c. brought to the office;—for appointing an office in *London* near the *Royal Exchange* to distribute policies properly stamped;—directing the mode of taking bonds from persons to whom policies are delivered on credit, and keeping proper accounts with them;—with directions for granting new policies in lieu of policies damaged; or where, by mistake, a wrong stamp has been used, or subscriptions have not been obtained to the amount of the stamp, on producing another policy made out for the same risk, provided it be brought to be cancelled in ten office days after the date of the subscription, or (if on an outward voyage) after the ship has sailed. Further regulations.

By the stat. 41 *G.* III. c. 10, § 1, all the duties imposed by the above act are doubled. By the 41 G. III. c. 10, the above duties are doubled.

Sect. 4.

When a Policy may be altered or corrected.

THOUGH a policy of insurance, not being under seal, is but a simple contract, yet, it is always looked upon as an instrument of great solemnity, being the only evidence of a contract of the utmost importance to the parties interested. The general form of the policy, which has been for many ages nearly the same, is never altered, but with the utmost caution, and upon very great consideration; (*a*) and therefore, when once a policy has been filled up and underwritten, no alteration can be made in it, but by the consent of all parties, or by the authority of a court of equity, or perhaps a court of law, and then only in a case where something has, by mistake A policy is never altered but by consent of parties, or the authority of the court.

(*a*) Vid. 1 *Skin.* 54.

miſtake or fraud, been inſerted or omitted, contrary to the manifeſt intention and the real agreement of the parties. And a very clear caſe of this ſort muſt be made out by unqueſtionable teſtimony to warrant ſuch alteration.

But where a clear caſe is made out, the court will direct the alteration to be made.

This may be done, even after a loſs has happened. But then it muſt clearly appear, 1ſt To be contrary to the intent; and 2dly, to be a proper caſe for the court to interpoſe.

But, the following caſes will ſhew, that where ſuch a caſe is made out, the court will direct the alteration to be made, even after a loſs has happened.

An inſurance was made on a ſhip, "At and from "*London* to *Oſtend*, from thence to *Rotterdam*, from thence "to the *Canaries*; warranted an *Oſtend* ſhip."—The ſhip was taken. The inſured brought his bill to have the policy rectified, according to the intention of the parties; by ſtating the voyage from *Oſtend* only, and not from *London*. —The evidence in ſupport of the plaintiff's caſe appearing to be contradictory, his bill was diſmiſſed. Lord Chancellor *Hardwicke*, in delivering his opinion, ſaid,—"No doubt but this court has juriſdiction to relieve, in reſpect to a plain miſtake in contracts, if reduced into writing contrary to the intent of the parties. And though the plaintiff comes to do this in a very harſh caſe; namely, upon a policy, after a loſs has happened, to vary the contract ſo as to turn the loſs on that inſurer, who otherwiſe, it is admitted, cannot be charged; yet if the caſe be ſo ſtrong as to require it, the court ought to do it. The *firſt* queſtion is, whether it ſufficiently appears to the court, that this policy, which is a contract in writing, has been framed contrary to the intent and real agreement of the parties; and *ſecondly*, ſuppoſing it ſo, whether this be ſuch a caſe, under the circumſtances of it, and the nature of the trade, as that the court ought to interpoſe and relieve."

Hamble v. *Roy. Ex. Aſſ.* 1 Vez. 317.

Where the inſtructions were to make a policy to commence from the ſhip's *arrival* at *A.* and the policy was made from the ſhip's *departure* from *A.* a court of equity

So where a policy ſtated that the adventure was to commence from the *departure* of the ſhip *Eyles* from *Fort St. George* to *London*;—upon a bill filed by the inſured it appeared that the owner had directed an inſurance to be made, "to commence from the ſhip's *arrival* at *Fort St. George*;" that a label, agreeably to theſe inſtructions, had been entered in a book, and ſigned by the agent and two of the directors of the *London Aſſurance*, and that, by miſtake, the

the policy was made out different from the label. The loſs happened *after* the ſhip's arrival at *Fort St. George.*— Lord Chancellor *Hardwicke* determined that the label which contained the names of the ſhip and of the maſter, the premium, and a deſcription of the voyage, was a memorandum of the agreement, in which the material parts of the policy were inſerted; that though the policy was ambiguous, yet the label made it clear; and as it was only the miſtake of the clerk, it ought to be rectified according to the label.

ordered it to be altered.

Motteux v. *Lond. Aſſur.* 1 *Atk.* 545.

When an underwriter agrees to alter the policy in order to correct a miſtake, he ſhall not afterwards object that he ought to have had an increaſe of premium.

Thus, where an agent had inſtructions to procure an inſurance on goods on board the *Mary* galley, Captain *Hill.*—The agent carried the letter to one *Stubbs*, a broker, and he, by miſtake, made the inſurance on the *Mary*, Captain *Hazlewood.* The *Mary* galley was loſt; and then *Stubbs* applied to the underwriters to conſent to alter the policy; to which they agreed, and the miſtake was rectified. It was objected at the trial, that, on account of the alteration, the inſurers ſhould have had an increaſe of *premium*, the ſhip *Mary* being a ſtouter veſſel than the *Mary* galley; but, Lord C. J. *Holt* ruled, that the action would lie upon the policy, that the miſtake might be ſet right, and that *Stubbs* was a good witneſs: And he cited a caſe which happened in the time of Lord C. J. *Pemberton*, where an inſurance was made from *Archangel* to the *Downs*, and from thence to *Legborn*; but there was a parol agreement at the ſame time, that the policy ſhould not commence till the ſhip came to ſuch a place; and it was held the parol agreement ſhould avoid the writing.

An underwriter having agreed to alter a policy ſhall not afterwards be permitted to object that he ought to have had an increaſe of *premium.*

Bates v. *Graham*, *Salk.* 444.

Even a partial agreement ſhall control the written policy.

CHAP. VIII.

Of Warranties.

HAVING, in the foregoing chapter, ſhewn the nature and properties of the common policy, we now proceed, according to the diſtribution of our ſubject, to treat of thoſe occaſional ſtipulations and agreements by which the general tenor of the contract, as expreſſed in the common policy, is qualified and regulated. Of theſe the moſt important are Warranties, which will now be treated of under the following heads, viz.

1. Of the nature and different kinds of warranties; and the effect of a breach of a warranty.
2. How an expreſs warranty ſhall be made.
3. Of the warranty to ſail by a given time.
4. Of the warranty to ſail with convoy.
5. Of the warranty of neutrality.

Sect. 1.

Of the nature and different kind of Warranties; and the effect of the breach of a Warranty.

Warranty defined. It may be either affirmative or promiſſory.

A warranty is a ſtipulation or agreement on the part of the inſured, in nature of a condition precedent.—It may be either *affirmative*, as where the inſured undertakes for the truth of ſome poſitive allegation; as, that the thing inſured is neutral property, that the ſhip is of ſuch a force, that ſhe ſailed, or was well on ſuch a day, &c. Or, it may be *promiſſory*; as, where the inſured undertakes to perform ſome executory ſtipulation; as that a ſhip ſhall ſail on or before a given day; that ſhe ſhall depart with convoy; that ſhe ſhall be manned with ſuch a complement of men, &c.

Warranties

Warranties are either *expreſs* or *implied*. An expreſs warranty is a particular ſtipulation introduced into the written contract by the agreement of the parties; as that the thing inſured is neutral property, that the ſhip ſhall ſail by a given day, that ſhe ſhall depart with convoy, &c. An implied warranty is that which neceſſarily reſults from the nature of the contract; as that the ſhip ſhall be ſea-worthy when ſhe ſails on the voyage inſured; that ſhe ſhall be navigated with reaſonable ſkill and care, that the voyage is lawful, and ſhall be performed according to law, and in the uſual courſe, and without wilful deviation, &c. We will confine ourſelves in the preſent chapter to the ſubject of expreſs warranties. The implied warranties of greateſt moment will be treated of in the 11th and 12th chapters of the preſent book.

It may be either expreſs or implied.

A warranty, like every other part of the contract, is to be conſtrued according to the underſtanding of merchants, and does not bind the inſured beyond the commercial import of the words.

It is conſtrued according to its commercial import.

Therefore, where there was a warranty that a ſhip ſhould have 20 guns, and it appeared that ſhe had in truth 22 guns, but only 25 men, which number is far ſhort of the neceſſary complement for 20 guns; in an action on the policy it was objected that this warranty implied a competent number of men to work 20 guns, in caſe the ſhip ſhould be attacked.—But it was determined that the warranty did not include any thing not neceſſarily implied in it. Lord *Mansfield* ſaid,—"If a warranty be meant to miſlead, it is a fraud, as much as a falſe repreſentation. In this caſe there is no ground to impute fraud, and therefore the plaintiff is entitled to recover."

Hyde v. *Bruce*, B. R. Hil. 23 G. III. MS.

A warranty being in the nature of a condition precedent, and therefore to be performed by the inſured before he can demand performance of the contract on the part of the inſurer, it is quite immaterial for what purpoſe, or with what view, it is made; or whether the inſured had any view at all in making it: But, being once inſerted in the policy, it becomes a binding condition on the inſured; and unleſs he can ſhew that it has been literally

It muſt be literally complied with.

literally fulfilled, he can derive no benefit from the policy. The very meaning of a warranty is, to preclude all queſtion whether it has been ſubſtantially complied with or not. If it be affirmative, it muſt be literally true; if promiſſory, it muſt be ſtrictly performed.

The breach of it avoids the contract *ab initio*.

The breach of a warranty, therefore, conſiſts either in the falſehood of an affirmative, or the non-performance of an executory ſtipulation. In either caſe, the contract is void *ab initio*, the warranty being a condition precedent: And whether the thing warranted was material or not; whether the breach of it proceeded from fraud, negligence, miſinformation, or any other cauſe, the conſequence is the ſame. The warranty makes the contract hypothetical; that is, it ſhall be binding, *if* the warranty be complied with. With reſpect to the compliance with warranties, there is no latitude, no equity; the only queſtion is, has the thing warranted taken place or not. If it has not, the inſurer is not anſwerable for any loſs, even though it did not happen in conſequence of the breach of the warranty. (*a*) This will appear in the following caſe:

And whatever it may be, or whether a loſs proceed from the breach of it or not, the inſurer is not liable.

A ſhip is warranted to ſail on her *outward voyage*, with 50 hands; but in fact, ſhe ſails with only 46.—This avoids the policy on her *middle voyage*, though during that voyage ſhe has 52 hands.

De Hahn v. *Hartley*, 1 T. R. 343.

In *June* 1779 an inſurance was made on a ſhip and cargo, 'At and from *Africa* to her port or ports of diſcharge in the *Weſt Indies*;' and in the margin of the policy was written this warranty;—"Sailed from *Liver*-"*pool* with 14 ſix pounders, ſwivels, ſmall-arms, and 50 "hands or upwards, copper-ſheathed."—The ſhip had ſailed from *Liverpool* in *October* 1778, having then only 46 hands on board, and arrived in *Beaumaris* in ſix hours after. She there took in ſix hands more, and, from that time till the capture, had 52 on board. It was found that in her voyage from *Liverpool* to *Beaumaris* ſhe was equally ſafe as if he had had 50 hands on board: The ſhip being captured, and the plaintiff, not knowing that the ſhip had ſailed from *Liverpool* with only 46 hands on board, paid his ſubſcription: But on learning that fact, he brought an action againſt the inſured to

(*a*) Vid. *Hibbert* v. *Pigou*, inf. 272.

to recover back this money thus paid in his own wrong.—It was contended on the part of the defendant, that this repreſentation had no relation to the voyage inſured, which was from *Africa* to the *Weſt Indies*, but only a repreſentation of the ſtate of the ſhip at *Liverpool*, before ſhe ſailed from thence, and was antecedent to the voyage inſured.—But the court determined that this was a warranty, and a condition that the ſhip had ſailed from *Liverpool* with a certain number of men; and this not being true, the policy was void.—This judgment was afterwards affirmed in the *Exchequer Chamber*.

To whatever cauſe the non-compliance is attributable, the contract is void.

It is alſo immaterial to what cauſe the non-compliance is attributable: For if it be not in fact complied with, though, perhaps, for the beſt reaſons, the policy is void: The condition has not been performed, or the contingency has not happened, on which the contract was made; and the underwriter has a right to ſay that there is no contract. Therefore, if a ſhip be warranted to ſail on or before a given day, and ſhe be prevented by any accident, as the ſudden want of repair, the appearance of an enemy, &c. from ſailing till the next day; though it may be right, in ſuch caſe, not to ſail on the day, yet the warranty is not complied with, and there is an end of the policy. (*a*)

Sect. 2.

How an expreſs Warranty ſhall be made.

A warranty muſt appear on the face of the policy.

An expreſs warranty, being of the nature of a condition precedent, our courts have held that it muſt appear upon the face of the policy, in order that there may be indiſputable and unequivocal evidence of a ſtipulation, the non-compliance with which muſt neceſſarily avoid the contract. Inſtructions in writing for effecting the

(*a*) Per Lord *Mansfield* in *Bond* v. *Nutt*, *Cowp.* 606, 7. inf. 255.

An irreſiſtible force, though one of the perils inſured againſt, will not excuſe the non-compliance with a warranty.

The detention, in this caſe, was one of the perils inſured againſt; and for which, while it laſted, the inſured might have abandoned. But inſtead of that, the ſhip ſails after the day ſtipulated by the warranty, and being taken, the inſured claims as for a loſs by *capture*, and alleges the detention by way of excuſe for the non-compliance with the warranty. The court, in deciding that, by reaſon of this non-compliance, the plaintiff could not recover for a loſs by capture, in effect decided that an irreſiſtible force, though one of the perils inſured againſt, would not excuſe the non-compliance with the warranty, ſo as to enable the inſured to recover for a loſs which happened after the day.

A warranty to ſail *after* a certain day muſt be obſerved with the ſame ſtrictneſs.

It may, in ſome caſes, vary the riſk materially, that the voyage ſhould not be commenced till after a certain ſeaſon be paſt. Sometimes, therefore, the warranty is to ſail *after* a certain day, and, before another day; and the following caſe will ſhew, that this muſt be complied with as ſtrictly as the warranty, to ſail *on or before* a given day.

A ſhip warranted to ſail from *Martinico after* a certain day, ſails for *Guadaloupe* before the day, intending to return to *Martinico*; but finding a full cargo at *Guadaloupe*, ſhe proceeds on her voyage.—This is a breach of the warranty.

Vivian v. *Grant*, at N. P. Eaſt. 1779. *Park* 326.

An inſurance was made on goods on board a *French* ſhip, "At and from *Martinico* to *Havre de Grace*, with "liberty to touch at *Guadaloupe*, warranted to ſail *after* "*the 12th of January*, and on or before the firſt of *Auguſt* "1778."—At the time the inſurance was made, it was not known whether the ſhip would load at *Martinico* or *Guadaloupe*, the inſured having goods to come from both places; the policy was therefore intended to cover the riſk from both or either. The ſhip ſailed from *Martinico* the 6th of *November* for *Guadaloupe*, where ſhe took in her whole lading, without returning to *Martinico*, as ſhe intended to have done had ſhe not got a complete cargo at *Guadaloupe*.—From thence ſhe ſailed for *Havre de Grace* on the 26th of *June* 1778, and was captured on the 3d of *September*.—In an action to recover for this loſs, it was objected by the defendant, that, according to the words of the policy, the voyage was to commence from *Martinico*, and not from *Guadaloupe*, and that the warranty of the time of ſailing was not complied with, the

ſhip

ſhip having ſailed from *Martinico before* the 12th of *January* 1778, to wit, on the 6th of *November* 1777. Mr. Juſtice *Buller*, who tried the cauſe, was of this opinion, and the jury, under his direction, found a verdict for the defendant.

But if a ſhip ſail before the day, from the port of loading in one of the *Weſt India* Iſlands, with all her cargo and clearances on board, to the uſual place of rendezvous, at another part of the ſame iſland, merely for the ſake of joining convoy: This is a compliance with the warranty, though the ſhip be detained at the place of rendezvous beyond the day. The reaſon is, that when a ſhip clears out for her port of loading, with a complete cargo, and has no other object in view but the ſafeſt mode of ſailing to her port of delivery, her voyage muſt be ſaid to commence from her departure from that port. If, indeed, her cargo was not complete, at the time ſhe ſailed, it would not have been a commencement of the voyage. This will be found decided upon great conſideration in the following caſe.

If the ſhip ſail before the day to join convoy, this ſhall be a compliance with the warranty, though the way to the place of rendezvous be out of the courſe of the voyage.

An inſurance was made on a ſhip, loſt or not loſt; "At and from *Jamaica* to *London; warranted to have "ſailed on or before the firſt of Auguſt* 1776."—The ſhip was completely laden at *St. Anne's* in *Jamaica*, and ſailed from thence on the 26th of *July* for *Bluefields*, in order to join the convoy there, that being the general rendezvous for convoy on the *Jamaica* ſtation, and where a convoy then lay expecting to ſail for *England* every day: But the greater part of the way from *St. Anne's* to *Bluefields* is out of the courſe from thence to *England*. On the ſhip's arrival at *Bluefields*, ſhe was ſtopped by an embargo laid on all veſſels at *Jamaica*, and detained there till the 6th of *Auguſt*, when ſhe ſailed, and was afterwards taken.—Upon theſe facts the jury found a verdict for the defendant, under the direction of Lord *Mansfield*, who tried the cauſe.—Upon a motion for a new trial, two points were made for the defendant.—1ſt. That the departure from *St. Anne's* was not a departure from *Jamaica*. 2dly. If it was, that the going to *Bluefields*, though for the purpoſe of convoy only, was a deviation, being out

A ſhip is warranted to ſail from *Jamaica* to *London, on or before a given day*; and before the day ſhe ſails from *St. Anne's* to *Bluefields*, to join convoy, and is there ſtopped by an embargo till after the day. Though *Bluefields* is out of her courſe,—yet, as ſhe went there only for convoy, this is a ſailing on her voyage before the 1ſt of *Auguſt*.

Bond v *Nutt*, *Cowp.* 601.

out of the courſe of the voyage.—Lord *Mansfield* at firſt ſeemed deſirous to know whether there were any authorities to ſhew that going out of the courſe of the voyage, *for the purpoſe of convoy only*, was no deviation, and deſired that a ſearch might be made for ſuch authorities. None, however, were found. At length, after great conſideration, the court were clearly and unanimouſly of opinion in favour of the plaintiff on both points. They held, that though *Bluefields* was out of the courſe from *St. Anne's* to *England*, yet, as the ſhip went there only to join convoy, this was a ſailing before the 1ſt of *Auguſt* and not a deviation.—Lord *Mansfield*, after acknowledging that his direction to the jury was wrong, ſaid;—"The port from whence the ſhip was to be inſured, was, if I may uſe the expreſſion, *the whole iſland*. We are all ſatisfied that the voyage from *Jamaica* to *England* began from *St. Anne's*: That when the ſhip left that place, ſhe had no view or object but to make the beſt of her way to *England*: That every other ſhip, under the ſame circumſtances, looked upon the touching at *Bluefields* to be the ſafeſt courſe of navigation from *Jamaica* to *England*; and that any other would have been imprudent: That the ſhip ſailed from *St. Anne's* for *England*, *by the way of Bluefields*; and not to *Bluefields* with any other view. If ſhe had gone there for any other purpoſe, as to take in water, or letters, or to wait for a convoy, none being ready, it would then have been one voyage to *Bluefields*, and another from thence to *England*. As neither party knew from what part of the iſland the ſhip would ſail, they uſed the words, "*At* and from *Jamaica*," which protected her in going from port to port till ſhe ſailed. It follows that the word *ſailed* in the warranty muſt mean, ſailed *on her homeward voyage*. The queſtion, then, is, Had ſhe or had ſhe not ſailed on or before the day? No matter what prevented her; if ſhe had not ſailed, though for the beſt reaſons, the policy would have been void. The contingency would not have happened, and there would have been no contract between the parties. If ſhe had been prevented by any accident till the 2d of *Auguſt*,

If the ſhip had gone to *Bluefields* for any other purpoſe, however neceſſary, it would have been a different voyage.

as

as by a ſudden want of repair, or the appearance of an enemy at the mouth of the port, the captain would have done very right not to ſail;—but then there would have been an end of the policy. It is very different from the caſes where a voyage has been begun; there the uſage of the voyage may juſtify going a little out of the direct courſe to join convoy, which may be reaſonable, and for the benefit of all parties. But ſtill it does not vary the fact of ſailing. Had the inſurance been *at and from, St. Anne's*, the going round the iſland to *Bluefields* would have been a deviation. (*a*)

If the voyage be begun, the uſage may juſtify going out of the courſe to join convoy.

So, where an inſurance was made, "At and from "*Guadaloupe* to *Havre, warranted to ſail on or before the* "*31ſt of December.*" In an action on this policy, to recover for a loſs by capture, it appeared that the ſhip took in her complete loading and proviſions for *France*, and all her clearances and papers, at *Point à Pitre*, in *Guadaloupe*, and, on the 24th of *October*, ſailed from thence to *Baſſeterre*, where there is no port, but only an open road. The governor detained her there till the 10th of *January*, when ſhe ſailed with a convoy, which had arrived ſome little time before; and after ſome days, being ſeparated from the convoy, ſhe was taken.—The captain, who was the only witneſs produced at the trial, ſwore that he and the other captains of ſhips at *Point à Pitre* bound to *Europe* had notice from the governor, ſome days before ſhe ſailed from thence, that a convoy was expected at *Baſſeterre* on the 25th of *October*; that he had uſed extraordinary exertions to get ready, and though he was not able to ſail before the 24th, he was ſtill in hopes of being in time for the convoy. The laſt ſhip's paper he received at *Point à Pitre* was *le role d'équipage*, or muſter-roll, dated the 24th of *October*, which gave authority to the captain to employ the crew, conſiſting of 20 perſons, in his return to *Havre*; adding this condition;

A ſhip inſured from *Guadaloupe* to *Havre*, warranted to ſail before the 31ſt of *December*, ſails on the 24th of *October* from *Point à Pitre* to *Baſſeterre*, to join convoy, and to receive the orders of the government. She is there detained by the governor till the 10th of *January*, and then ſails with convoy, from which ſhe is ſeparated and taken.—The ſailing from *Point à Pitre* on the 20th of *Auguſt*, is a compliance with the warranty.

Thelluſſon v. *Fergusſon*, *Doug.* 346.

(*a*) Upon the ſecond trial, the plaintiff had a verdict.—Vid. Lord *Manſfield*'s obſervations on this caſe, in *Thelluſſon* v. *Staples*, *Doug.* 352. n.

tion; "*paſſant à la Baſſeterre pour y prendre les ordres du gouvernement.*" Under this was written, on the ſame paper, an account, dated the 30th of *October*, of ſome changes in the number of the crew; and under that, an entry by an officer of the marine, dated at *Baſſeterre*, the 2d of *January*, ſtating that he had examined the perſons on the roll, conſiſting of 25, including the captain,—and granting the captain permiſſion to return to *Havre*. On another paper produced by the plaintiff, called *le congé*, dated the 16th of *October*, were written at the bottom theſe words; "*Vu de relache à la Baſſeterre pour y attendre un convoi pour France. Ce* 28 *Octobre* 1778." The captain ſwore he underſtood that the only reaſons for the condition inſerted in the muſter-roll, that he ſhould go to *Baſſeterre*, were, that the convoy was to be at that place, and that he might take ſuch diſpatches as were ready for *Europe*. He had not objected to it, becauſe, in the regular courſe of his voyage to *France* from *Point à Pitre*, he muſt have gone that way, to avoid *Montſerrat*. If he had arrived in the day time, he would not have caſt anchor, but would have ſent his boat for the diſpatches; but having arrived at night, his ſhip had been detained contrary to his expectation.—On the part of the defendant, beſide the muſter-roll, and the entry under it, were read a proteſt made by the captain on his arrival at *Dover*, and a part of his depoſition in the proceedings in the admiralty. The words of the proteſt, relied on, were, "Whereupon he (the captain) waited "upon the proper officer at *Point à Pitre* for his muſter-"roll, and was by him informed that it would not be "granted, but on condition that he ſhould firſt ſail to "*Baſſeterre* and *there wait* the directions of the General "of the iſland." In a ſubſequent part he ſtates that he ſent to the ſuperintendant, and to the general, to inform them, "that the ſhip and cargo were inſured, upon "condition that ſhe ſhould depart from the iſland of "*Guadaloupe*, before the 31ſt of *December*; the terms of "which inſurance it was eſſential to fulfil. Notwith-"ſtanding which, he was refuſed permiſſion to depart,

"and

"and was kept there till after the 31ſt of *December*." The depoſition principally relied on was as follows: "At the "time the ſhip was firſt purſued and taken, ſhe was ſteer- "ing her courſe towards *Breſt*. Her courſe was not altered "upon the appearance of the veſſel by which ſhe was taken. "It was at all times, when the weather would permit, di- "rected to *Breſt*, for which point ſhe was directed to "ſail, although her deſtination was for *Havre*, by the "ſhip's papers. She was not ſailing *beyond or* wide "of *Havre*. She was then about 8 leagues weſt of "*Uſhant*, and her courſe was not altered to any other "port, but was obliged to be directed to *Breſt*, in con- "ſequence of *the orders he had received*, ſubſequent to "the delay of the ſhip's papers.—That all the ſhip's "papers found on board were true and fair, and none of "them falſe or colourable."—At the trial the captain alſo ſwore that his father, who had formerly commanded the ſhip, at *Baſſeterre*, directed him to keep in the courſe to *Breſt*: *But this was done as the ſafeſt way, in time of war, of getting to* Havre, *which ſtill continued to be the place of the ſhip's deſtination*.—Upon this evidence the plaintiff obtained a verdict; and upon a motion for a new trial, two objections were made on the part of the defendant. 1ſt. That there had been no inception of the voyage on the 24th of *October*, nor till after the 31ſt of *December*, though it was admitted that a *bonâ fide* and complete inception of the voyage was ſufficient, even though the force of an embargo, or any other compulſion, ſhould oblige the ſhip immediately to ſtop, or put back.(*a*)—2dly, That the ſhip never ſailed on the voyage inſured, viz. from *Guadaloupe* to *Havre*, but on a voyage from *Guadaloupe* to *Breſt*.—The court determined in favour of the plaintiff on both points. Lord *Mansfield* ſaid,—"There is no contradiction between the parole evidence, and the proteſt and depoſition. Under an

Under an inſurance '*at and from*' an iſland like *Guadaloupe* or *Jamaica*, the ſhip is protected by the policy in going from port to port in the iſland.

(*a*). So ruled in a former caſe between the ſame parties, and in a caſe of *Earl* v. *Harris*, *Doug.* 352, n. inf. 260.

an inſurance '*at and from*' ſuch a place as *Guadaloupe* or *Jamaica*, the word, "*at*" compriſes the whole iſland, and, under that word, the ſhip is protected in going from port to port round the coaſt of the iſland: But the queſtion here is, whether the voyage was *bonâ fide* commenced, and ſtopped by accident. As to the condition about taking the orders of government, the ſhip could not ſail from any part of the iſland without the governor's leave. But the captain, when he left *Point à Pitre*, expected to meet a convoy at *Baſſeterre*, and to proceed immediately, without interruption. A convoy had been publiſhed, and he certainly would have gone to *Baſſeterre*, at any rate, independent of the clauſe in the muſter-roll. With regard to the ſecond point, the voyage to *Breſt* was, at moſt, but an intended deviation not carried into effect."—Mr. Juſtice *Buller* ſaid,—"The caſe between the ſame parties, in 1777 is in point. There was no embargo then, nor in the preſent caſe, when the ſhip ſailed. Here there was a *bonâ fide* ſailing; and the ſhip was completely ready in all reſpects."

The ſame point determined on a ſecond trial.

Thellusſon v. *Staples*, *Doug.* 352, n.

The other underwriters on this policy, being diſſatisfied with this deciſion, another cauſe was brought to trial upon the ſame evidence.—The ſecond point was abandoned; but upon the firſt, it was inſiſted that, "To conſtitute a ſailing within the meaning of the warranty in this policy, the veſſel, at the time of ſailing from her port of loading, muſt be, in the contemplation of the captain, at abſolute and entire liberty to proceed to her port of delivery in a mathematical line, if it were poſſible."—Lord *Mansfield*, at the trial, remained of the ſame opinion as in the former caſe, and there was again a verdict for the plaintiff, to which the defendant and all the other underwriters ſubmitted without further litigation.

If an embargo be publiſhed before the ſhip ſails, and the captain puts himſelf into it, but in the hope of its being immediately taken

Lord *Mansfield*, in his charge to the jury in this laſt caſe, cited the caſe of *Earl* v. *Harris*, which he ſaid was a ſtill ſtronger caſe.—There, an embargo was actually publiſhed before the ſhip ſailed, and the captain immediately after croſſing the bar, returned to make a proteſt,

proteſt, and ſent his ſhip knowingly into the embargo: But he ſwore that he expected the embargo would be taken off, and that he ſhould proceed immediately upon his voyage; and the jury believed him.

off; this will excuſe his not ſailing by the day.

Earl v. *Harris* at N. P. Hil. Vac. 1780—*Doug.* 352. n.

As to the queſtion, what ſhall amount to a ſailing, to ſatisfy this warranty; there can be no doubt that where a ſhip once breaks ground, and is fairly under ſail *upon her voyage*, though ſhe goes ever ſo little a way, and afterwards puts back from ſtreſs of weather, or apprehenſion of an enemy in ſight, or be then put under an embargo, and detained beyond the time of ſailing: This would ſtill be a *beginning* to ſail, and the interruption would not alter the caſe, becauſe the warranty had already been complied with. (*a*)

If a ſhip once break ground, and get fairly under ſail before the day; this is a compliance with the warranty, though ſhe be drove back, by ſtreſs of weather, or detained by an embargo.

It is ſaid, that in the caſe of an inſurance, *at and from London*, warranted to depart on or before a given day, it has long been a queſtion, what ſhall be a departure from the port of *London*; or rather what is the port of *London*. (*b*) But if the above doctrine of Lord *Mansfield* be well founded, it ſeems to afford a ready anſwer to this queſtion. The warranty does not require that the ſhip ſhall abſolutely leave her port of departure; but only that ſhe ſhall get under way *with intent to proceed on the voyage inſured.*

Sect. 4.

Of the Warranty to ſail with Convoy.

ANOTHER ſpecies of warranty often inſerted in policies in time of war, is *to ſail, or to depart, with convoy.* This, like other warranties, muſt be ſtrictly performed; and nothing will excuſe the non-performance of it. If, therefore, a ſhip, warranted to depart with convoy, ſail without convoy, the policy becomes void, *defectu conditionis*, whether this be imputable to

This warranty muſt be ſtrictly performed.

And if the ſhip ſail without convoy, from whatever cauſe, the policy will be void. And the inſurer ſhall

(*a*) Per Lord *Mansfield*, at N. P. in *Thelluſſon* v. *Ferguſſon*, *Cowp.* 607.—(*b*) *Park*, 338.

not be anſwerable even for a loſs by the perils of the ſea.

to any omiſſion on the part of the inſured, or the refuſal of government to appoint a convoy. And in ſuch caſe, the inſurer ſhall not be anſwerable, though the ſhip ſhould be loſt by the perils of the ſea; for in time of war, a ſhip without convoy will expoſe herſelf to every other peril, to avoid that of an enemy. The fear of one danger often drives us into greater; *Cum plus in metuendo mali ſit, quam in ipſo illo quod timetur.*

A ſhip is diſabled in her paſſage to the place of rendezvous, ſo as to require a repair, and the convoy ſails without her.—Whether ſhe may ſail without convoy.

Emerigon puts the following caſe, in which he thinks the ſailing with convoy may be diſpenſed with.—A ſhip is inſured from *Marſeilles* to *Toulon*, there to join convoy, and proceed to *America*. In her paſſage to *Toulon* ſhe ſuffers conſiderable damage, and is obliged to undergo a repair there, which renders it impoſſible for her to avail herſelf of the convoy. This being a misfortune occaſioned by the perils of the ſea, he thinks that the ſhip, when repaired, may proceed without convoy, at the riſk of the inſurer. (*a*)

There are five things eſſential to a ſailing with convoy, viz. *firſt*, it muſt be with the regular convoy appointed by government; *ſecondly*, it muſt be from the place of rendezvous appointed by government; *thirdly*, it muſt be a convoy for the voyage; *fourthly*, the ſhip inſured muſt have ſailing inſtructions; *fifthly*, ſhe muſt depart and continue with the convoy till the end of the voyage, unleſs ſeparated by neceſſity. We will conſider each of theſe ſubjects ſeparately.

1. *It muſt be with the regular convoy appointed by government.*

A convoy what.

A convoy, within the meaning of this warranty, is a naval force under the command of an officer appointed by government for the protection of merchant ſhips and others, during the whole voyage, or ſuch part of it as is known to require ſuch protection.

The

(*a*) Vid. *Emerig.* tom. 1, p. 164.

The importance of the duty which the officers and ſeamen, belonging to ſhips of war employed as convoy, have to execute, has induced the legiſlature to ſubject them to a more than ordinary reſponſibility; for by the articles of war, enacted by the ſtat. 22 *G.* II. c. 33, art. 17, 'The officers and ſeamen of all ſhips appointed 'for convoy and guard of all merchant ſhips, or of any 'other, ſhall diligently attend upon that charge, without 'delay, according to their inſtructions in that behalf; and 'whoſoever ſhall be faulty therein, and ſhall not faith-'fully perform their duty, and defend the ſhips and goods 'in their convoy, without either diverting to other parts 'or occaſions, or refuſing or neglecting to fight in their 'defence, if they be aſſailed, or running away cowardly, 'and ſubmitting the ſhips in their convoy to peril and 'hazard; or ſhall demand or exact any money or other 'reward from any merchant or maſter for convoying of 'any ſhips or veſſels entruſted to their care, or ſhall miſ-'uſe the maſters or mariners thereof, ſhall be condemned 'to make reparation of the damage to the merchants, 'owners, and others, as the court of admiralty ſhall ad-'judge, and alſo be puniſhed criminally according to the 'quality of their offences, be it by pains of death or 'other puniſhment, according as ſhall be adjudged fit by 'the court martial.'

By the articles of war, art. 17, the officers and ſeamen of ſhips employed as convoy, are ſubjected to ſevere puniſhment for any miſbehaviour.

A warranty to ſail with convoy, or with convoy *for the voyage*, which is the ſame thing, is underſtood to mean, with ſuch a convoy as government thinks proper to appoint; and whether it conſiſt of one convoy for the voyage, or ſeveral convoys taken at different ſtations, it is ſtill unqueſtionably a convoy for the voyage. (*a*)

A warranty to ſail with convoy, means ſuch convoy as government ſhall appoint.

It is not every ſingle ſhip of war, which may happen to take merchant ſhips under her protection, that conſtitutes a convoy, within the meaning of the warranty, or the underſtanding of merchants. Nothing ſhort of ſailing with the convoy appointed by government for the voyage.

Sailing with any other force than the convoy regularly appointed, will not ſatisfy the warranty.

(*a*) Per Lord *Mansfield*, in *Smith* v. *Readſhaw*, at N. P. 1781, *Park*, 349.

voyage will ſatisfy the warranty. The reaſon is, that government muſt be ſuppoſed to be beſt acquainted with the plans and force of the enemy, and the ſtrength neceſſary to repel their attempts.

A ſhip arrives at the place of rendezvous, but finding the convoy had ſailed before the appointed time, ſhe puts herſelf under the protection of a man of war, and joins the convoy: This is not a ſailing with convoy.

Therefore, in a caſe which we ſhall have occaſion to mention more particularly preſently, (*a*) where the ſhip inſured arrived at the place of rendezvous before the time appointed for the convoy to ſail; but finding the convoy gone, put herſelf under the protection of a man of war, which came there to join the ſquadron which compoſed the convoy, and under her protection joined the convoy, but without obtaining ſailing inſtructions: This was determined not to be departing with convoy within the meaning of the warranty.

2. *It muſt be from the place of rendezvous appointed by government.*

This is the meaning of the warranty: For though it is uſually expreſſed in general terms *to depart*, or *to ſail* with convoy, yet, as it would often be impracticable, ſometimes inconvenient, and in many caſes unneceſſary, to appoint a convoy to ſail from each particular port, there are certain places of rendezvous, appointed by government for general convenience, to each of which the merchant ſhips from the neighbouring ports may repair, by a given day, for convoy: And it is a ſufficient compliance with the warranty if a ſhip depart with convoy from ſuch place of rendezvous. (*b*) This, like moſt other queſtions relating to inſurance, is regulated by the general uſage of trade.

In a voyage from *London* to the *Eaſt Indies*, it is ſufficient to ſail with convoy from the *Downs*.

Lethulier's caſe, *Salk.* 443.

Thus:—An inſurance was made, "from *London* to the *Eaſt Indies*, warranted *to depart with convoy*." The declaration ſtated, that the ſhip proceeded to the *Downs*, and ſailed on her voyage from thence with convoy, and was loſt.—On demurrer to this declaration, it was objected that this departing with convoy from the *Downs* was not a departing with convoy within the meaning of the

(*a*) *Hibbert* v. *Pigou*, inf. 272.—(*b*) The ſame rule prevails in *France*, vid. *Emerig.* tom. 1, p. 166.

the warranty: But the court held, that this warranty muſt be conſtrued according to the uſage of merchants; that is, that the ſhip ſhould ſail with convoy from ſuch place where a convoy for the voyage is to be had; as the *Downs*, &c.—Lord C. J. *Holt* differed in opinion from the other judges of the court: He ſaid,—'We take notice of the laws of merchants that are general, not of thoſe that are particular uſages. It is no part of the law of merchants to take convoy in the *Downs*.'—But the obvious anſwer to this objection is, that, to take convoy *at the uſual place of rendezvous*, is part of the general law of merchants.

The warranty being thus underſtood, it follows that the ſhip or goods inſured are protected by the policy in their paſſage from the port of loading to the place of rendezvous appointed by government. And therefore, if the parties mean to vary from the common courſe, and to ſpecify any particular place of joining convoy, this muſt be particularized in the policy.

The ſhip is protected by this policy in her paſſage to the place of rendezvous.

Thus:—A ſhip was inſured "from *London* to *Gibraltar*, warranted to depart with convoy."—There was a convoy appointed at *Spithead*, and the ſhip, having tried for convoy in the *Downs*, proceeded for *Spithead*, and was captured in her paſſage thither.—In an action on the policy, the inſurers inſiſted that, this being the time of a *French* war, the ſhip ſhould not have ventured through the *Channel*, but ſhould have waited in the *Downs* for an *occaſional* convoy: And many merchants and office keepers were examined to that purpoſe.—But Lord C. J. *Lee*, who tried the cauſe, held that the ſhip was to be conſidered as under the protection of the policy *to a place of general rendezvous*, according to the interpretation of this warranty in the foregoing caſe. And if the inſurers meant to vary the inſurance from what is commonly underſtood, they ſhould have particularized her departure from the *Downs*. The jury under this direction found for the plaintiff. (*a*)

A ſhip is inſured from *London* to *Gibraltar*, and the convoy appointed at *Spithead*: The ſhip is protected thither by the policy.

Gordon v. *Morley*, at N. P. 2 *Str.* 1265.

3. *It*

(*a*) Vid. *Emerigon*, tom. 1, p. 166, S. P.

3. *It muſt be a convoy for the Voyage.*

A warranty to ſail with convoy generally, means a convoy for the voyage.

A warranty to ſail with convoy generally, means to ſail with convoy *for the voyage*; and it is not neceſſary to add the words, '*for the voyage*,' in order to make it ſo. Neither will the adding of theſe words in ſome inſtances, make the omiſſion of them, in any caſe, the ground of a different conſtruction. If, therefore, it be ſtipulated in a policy, that the underwriters ſhall return a part of the premium, if the ſhip ſails with convoy and arrives, this, like a general warranty to ſail with convoy, means a convoy for the voyage; and ſailing with a convoy for only a part of the voyage, will not entitle the inſured to the ſtipulated return of premium.

Where part of the premium is to be returned in caſe the ſhip ſails with convoy and arrives, this means a convoy for the voyage.

Part of the premium is agreed to be returned if the ſhip ſail with convoy from *Gibraltar*, and arrive.—This means a ſailing with convoy *for the voyage*; and a ſailing with convoy for part of the voyage will not entitle the inſured to the return of premium.

Lilly v. *Ewer*, *Doug.* 72.

Thus:—The *Parker Galley* was inſured, "At and "from *Venice* to the *Currant Iſlands*, and at and from "thence to *London*;" at a premium of five guineas *per cent.* "to return two *per cent. if the ſhip ſailed with convoy* "*from Gibraltar*, and arrived."—The ſhip touched at *Gibraltar* on her way home, and ſailed from thence under convoy of a ſloop of war; which, however, was only deſtined to go to a certain latitude, as far as *Cape Finiſterre*, being ordered on the *Liſbon* ſtation; and accordingly, the ſhip and convoy ſeparated, and the ſhip arrived ſafe at *London*.—The inſured brought an action for money had and received againſt one of the underwriters, for a return of the two *per cent.* and the only queſtion was, whether, by the terms of the policy, the condition for the return of this two *per cent.* was, a departure from *Gibraltar*, with ſuch convoy as could be met with, for whatever *part of the voyage* that might happen to be; or, a departure with convoy *for the voyage*.—At the trial, the plaintiff called witneſſes to prove, that, for ſome years paſt, when a convoy *for the voyage*, or the *whole voyage*, was intended, thoſe explanatory words had been added; and that, by this uſage, the expreſſions, "ſailing with convoy," and, "ſailing with convoy *for the voyage*," had acquired diſtinct technical meanings; "with convoy," merely, ſignifying whatever convoy the ſhip ſhould depart with, whether for a greater or leſs part of the

the voyage. Several policies were alſo produced filled up by the ſame broker who had prepared the preſent, in which the words, "for the voyage," or, "for *England*," were added. It was alſo proved, that at the time when the ſhip left *Gibraltar*, no other convoy was to be had. Witneſſes for the defendant ſwore, that they underſtood the words, "*with convoy*" to mean, convoy *for the voyage*: And the broker ſaid, that, at the time this policy was ſigned, he underſtood, and apprehended it was ſo underſtood by all the parties, that the convoy was to be for the voyage; and that the return was ſuch as was uſual when that was meant.—There was a verdict for the plaintiff. But the court of King's Bench, upon motion, ſet this verdict aſide, and granted a new trial, being of opinion that the words, "to depart with convoy," mean with convoy *for the voyage*.—Lord *Mansfield*, who had tried the cauſe, ſaid,—"At the trial I was ſtrongly of opinion, that, on the words, the policy meant a departure with convoy intended for the voyage. The parties could not mean a departure with convoy that might be deſigned to ſeparate from the ſhip in a minute or two. But I ſtill think that the evidence of an uſage, not inconſiſtent with the words of the policy, was properly received at the trial. However, the people in the city think the evidence of the plaintiff's witneſſes was founded on a miſtake. Certainly, critical niceties ought not to be encouraged in commercial concerns, and wherever you render additional words neceſſary, and multiply them, you multiply doubts and criticiſms. It may be hard, becauſe words have been added in ſome inſtances, to force a conſtruction in a particular caſe, by the omiſſion of them."—Upon the ſecond trial there was a verdict for the defendant.

Evidence of an uſage of trade not inconſiſtent with the terms of the policy, is admiſſible.

Yet, a warranty to ſail with convoy does not, in all caſes, mean a convoy which is to accompany the ſhip inſured the entire way from her port of departure to her port of deſtination. The following caſe will ſhew that a convoy means ſuch convoy as government thinks fit to appoint as a ſufficient protection for ſhips going the voyage

Yet, this warranty does not always mean a convoy from the port of departure to the port of deſtination; it means ſuch convoy as government ſhall appoint for the voyage inſured.

voyage insured; whether it be for the whole or only a part of the voyage.

Goods are insured from *London* to *St. Sebastian*, and a convoy is appointed from *Spithead* to *Bilboa*: This being the convoy appointed by government for this voyage a sailing with it is a compliance with the warranty.

An insurance was made on goods, "At and from *London* to *St. Sebastian*, in *Spain*, *warranted to depart with convoy for the voyage*."—No convoy was appointed directly to *St. Sebastian*, but the ship sailed from *Spithead* under a convoy of frigates, the commander of which had orders from the admiralty, to proceed to *Gibraltar*, with the trade bound "to that place and *Bilboa*, and to detach the *Weazel* sloop of war with the latter, with "orders to see them safe to *Bilboa*, and then return to "*England* with such vessels as he should find at *Bilboa*." At the proper time, the *Weazel* was detached by the *Commodore*, with the trade to *Bilboa* and *St. Sebastian*, with orders, "to see them safe *off Bilboa*; and to take "any vessels bound from thence to *England*, under his "convoy to *Spithead*." The *Weazel* proceeded on this voyage, but soon after parted from the ships under his convoy, in chase of a strange ship, and did not afterwards join them. The ship arrived safe off *Bilboa*, which was in her course to *St. Sebastian*, but was taken in her way thither.—In an action on the policy, the underwriters objected that, the convoy being only to *Bilboa*, the warranty had not been complied with. That a convoy to *Bilboa* could no more be construed to be a convoy to *St. Sebastian*, than a convoy to the *Cape of Good Hope* would be a convoy to the *East Indies*.—But the court held clearly that this was a compliance with the warranty.—Mr. Justice *Buller* said, that this was not like the case of *Hibbert* v. *Pigou*; (*a*) for there a convoy was appointed and actually sailed from *Jamaica* to *England*: That the owner of a ship, when he makes an insurance, cannot know the orders of the admiralty respecting convoys; but must take such convoy as is provided for him: That, as to the instance of a convoy to the *Cape of Good Hope*, if government thought that a sufficient protection to the *East India* trade, and the usage were for *East India* ships.

D'Eguino v. *Bewick*, 2 *H. Bl.* 551.

Were government to think a convoy to the *Cape of Good Hope* sufficient for ships going to the *E Indies*,

(*a*) Inf. 272.

ſhips to ſail with convoy only to the *Cape*, and to conſider that as the *Eaſt India* convoy, and no other convoy were appointed to the *Eaſt Indies*, the warranty would be complied with; though if there were another convoy to the *Eaſt Indies*, it would be otherwiſe.

and this were according to the uſage; ſailing with ſuch convoy would be a ſufficient compliance.

So, if a ſhip ſail with a convoy for a part of the voyage, with intent to take another convoy for the reſidue, being according to the uſage of the particular trade; this is a compliance with the warranty.

If there be ſeparate convoys for different parts of the voyage, it will be a convoy within the warranty.

Thus:—An inſurance was made on a ſhip from *Tortola* to *London*, "warranted to ſail *with convoy for the voyage*." —In an action on this policy it appeared, that a frigate was ſent by the commander at *Saint Kitts* to *Tortola*, to bring up the ſhips from thence, with orders, if they got a certain way to the northward, to go ſtraight for *England*. They ſailed from *Tortola*, but the ſhip inſured being a bad ſailer, fell behind, loſt the convoy, and bore away for *England*, but was captured on her paſſage.—There was evidence that ſhe could not have made either *Saint Kitts* or *Tortola* again, and that ſhe did for the beſt in bearing away for *England*. On the other ſide it was in evidence that ſhe might have kept up with the convoy, as the frigate never ſailed above three knots an hour.—There was a verdict for the plaintiff.—Upon a motion for a new trial, the court held this to be a ſufficient ſailing with convoy within the meaning of the warranty. —Lord *Mansfield* ſaid,—"The frigate was the convoy from *Tortola*. The warranty never ſpecifies the *force* of the convoy, that being left to government. The policy is, that the ſhip ſhall ſail from *Tortola* with convoy *for the voyage*. But the uſage governs this agreement. The commander ſends part of his force to bring them to meet him, and that is a convoy from *Tortola*. The ſailing orders are from the commander of the convoy for *England*.

A ſhip ſails with a frigate from the place of departure to the general rendezvous with directions, in a certain caſe, to proceed ſtraight on the voyage inſured: The ſhip loſes the convoy, and inſtead of proceeding to the place of rendezvous, bears away for her place of deſtination:—This is a ſailing with convoy.

Manning v. *Giſt*, B. R. E. 22 G. III.—M. 8.

So, where the ſhip *Ceres* was inſured, "At and from *Oporto* to *Lynn*, with liberty to touch and ſtay at any ports or places on the coaſt of *Portugal*, to join convoy, particularly at *Liſbon*; at 12 guineas *per cent.*, to return 6 l. if the *Ceres* ſailed with convoy from the *coaſt of Portugal* and arrived."—In an action to recover this 6 l. *per cent.*

A ſhip is inſured at twelve guineas *per cent.* to return 6 l. if ſhe ſail with convoy *from the coaſt* of *Portugal*, and arrive. She ſails under convoy from *Oporto* for

Lisbon, the general rendezvous, in order to sail from thence with the whole fleet. The ships, in their passage from *Oporto* to *Lisbon*, being dispersed, the ship insured runs for *England* and arrives. This is a sailing with convoy, so as to entitle the insured to the return of premium.

Audley v. *Duff*, 2 *Bul.* & *Bos.* 111.

cent. of the premium, it appeared that, at the time the *Ceres* was to sail, there were many merchant ships collected in the different ports of *Portugal*, and Lord *St. Vincent*, the commander on that station, being unable to afford separate convoys for *England* from each port in *Portugal*, sent a cutter and a sloop to fetch the trade from *Oporto* to *Lisbon*, where they were to lie in the bay of *Doyras*, without entering the port of *Lisbon*, to avoid the *Lisbon* duties. From that place a convoy was appointed for the whole trade to *England*. The *Oporto* fleet, in proceeding to *Lisbon*, being dispersed, lost the convoy, and the *Ceres*, then judging it for the best, ran for *England*, and arrived.—It was contended on the part of the defendant, that the *Ceres* never left the *coast of Portugal* with convoy. Lord *Eldon*, who tried the cause, told the jury that, as the *Oporto* trade had put themselves under the convoy of the cutter and sloop which formed a part of the aggregate convoy for *England*, they had deprived themselves of all power of acting for themselves, and had therefore departed with convoy from the *coast of Portugal*. He added, that the liberty given by the policy to touch at other ports on the coast of *Portugal*, did not vary the inference of her being under convoy for *England* from the moment she received sailing instructions; and from that time that liberty was at an end. The jury, upon this direction, found a verdict for the plaintiff.—Upon a motion to set this verdict aside, and enter a nonsuit; the court were clearly of opinion that the event had happened on which the plaintiff's title to a return of premium was to attach, and therefore that the verdict was right.—Lord *Eldon* said—"It being unknown in *England* from what port on the coast of *Portugal* the convoy would sail, the clause for a return of premium was to be adapted to the circumstances of the case. The departure with convoy might be from *Oporto*, or it might be from some other place. It became necessary, therefore, to introduce some expression, which extended to something more than a mere departure from *Oporto*. The fair interpretation of the agreement is, that the insured shall have the benefit of the policy, though

though the ſhip ſhould ſail from *Oporto* without convoy; but that if ſhe ſailed from *Oporto*, which is on the coaſt of *Portugal*, with convoy, then there ſhould be a return of premium."

A ſhip inſured from *Cadiz* to *Amſterdam* takes a convoy to *England*, with intent to take another convoy to *Amſterdam*. This being according to uſage, is a compliance with the warranty.

So, where a ſhip, inſured "At and from *Cadiz* to *Amſterdam*, warranted to depart with convoy for the voyage," ſailed from *Cadiz* under a *Britiſh convoy*, and was loſt before ſhe reached the *Downs*, where it was alleged the ſhips were to have taken a freſh convoy for *Amſterdam*.—In an action on this policy, the underwriters inſiſted that the convoy ſhould have been direct to *Amſterdam*. The inſured, on the other hand, contended, that all convoy muſt be according to uſage, and that, in many voyages, there is no ſuch thing as a direct convoy; but the ſhips proceed by *relays* of convoy, from ſtage to ſtage. Lord *Kenyon*, who tried the cauſe, was of opinion, that the warranty had been complied with; and the plaintiff had a verdict.

De Garray v. *Clagget*, at N P. 1795. *Park*, 349.

4. *The ſhip inſured muſt have ſailing Inſtructions.*

Sailing inſtructions, what.

SAILING inſtructions are written or printed directions, delivered by the commanding officer of the convoy to the ſeveral maſters of the ſhips under his care, by which they are enabled to underſtand and anſwer his ſignals, to know the place of rendezvous appointed for the fleet in caſe of diſperſion by ſtorm, or by an enemy, &c. Such, therefore, is the utility and the neceſſity of theſe ſailing inſtructions, that no veſſel can have the full protection and benefit of convoy without them. Sailing inſtructions are, therefore, ſo eſſential to a ſailing with convoy, that, in general, unleſs they be obtained, the warranty is not complied with. It is one thing to be under the *convoy* of a ſhip of war, and another thing to ſail merely under her *auſpices*. *(a)* This will appear by the following deciſion.

Eſſential to a ſailing with convoy

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(*a*) "Autre choſe eſt d'etre ſous l'eſcorte d'un batiment du Roi, et autre choſe eſt de naviguer ſimplement ſous ſes auſpices." *Emerig.*

A ſhip arrives at the place of rendezvous before the time appointed for the convoy to ſail; but finding the convoy gone, puts herſelf under the protection of a man of war, and afterwards joins the convoy, but without getting ſailing inſtructions: This is not a departing with convoy.

Hibbert v. *Pigou*, B. R. Eaſt. 23 G. III. M. S. —S. C. *Park*, 393.

An inſurance was made on the *Arundel*, Captain *Mann*, "At and from *Jamaica* to *London*, *warranted to depart* "*with convoy*."—The ſhip ſailed from *Morant* harbour to *Kingſton*, where ſhe met the *Glorieux*, Captain *Cadogan*, on her way to join Admiral *Graves* at *Bluefields*, who had been commanded by Lord *Rodney*, to rendezvous there, in order to convoy the merchant ſhips, which were to ſail from thence on the firſt of *Auguſt* to *Great Britain*. Captain *Mann* aſked for ſailing orders from Captain *Cadogan*, who ſaid he had none, not having joined the admiral; but he was ſure the admiral would not ſail from *Bluefields* before the *Glorieux* joined him. If he ſhould, he Captain *Cadogan*, would give Captain *Mann* ſailing orders, and take every care of the *Arundel*. They proceeded together, and arrived at *Bluefields* on the 28th of *July*; but found that Admiral *Graves* had ſailed two days before. The *Glorieux* and *Arundel* then ſailed from *Bluefields*; the former behaving in every reſpect *as a convoy*. On the 7th of *Auguſt* they joined the fleet off *Cape Anthonio*. In *September*, the whole fleet was diſperſed in a ſtorm, and the *Arundel* with many others loſt.—Upon this evidence, Lord *Mansfield*, who tried the cauſe, was of opinion that the warranty had not been performed, and under his direction, the jury found for the defendant.—Upon a motion for a new trial, this opinion was confirmed by the court.—Lord *Mansfield* ſaid, "There are hypothetical contracts, and conditional contracts.

Emerig. tom. 1. p. 171. There is in *Park*, 4th Edition, p. 342, a caſe of *France* v. *Kirwan* at N. P. after Mich. 38 *G.* III. in which it is ſtated that it was the object of the plaintiff to get a deciſion on the point, *how far ſailing inſtructions were eſſential to a ſailing with convoy*; and that Lord *Kenyon* expreſſed the ſtrong inclination of his opinion to be, that they were eſſential; but he would not decide it, as the ſhip in queſtion had never, in fact, joined; and upon that ground the plaintiff was non-ſuited. —It is ſomewhat ſtrange, that the plaintiff in that caſe ſhould ſeek to obtain a deciſion upon a point that ſeems to have been already ſettled as a general propoſition; but it is ſtill more ſtrange that the plaintiff ſhould hope to get a point decided which in his caſe never could ariſe, ſince the ſhip inſured had never joined the convoy at all.

contracts. In the former, the contract depends on an event taking place. There is no latitude, no equity; the only queſtion is, has that event happened? But conditional contracts admit of a more liberal conſtruction. Now the only queſtion upon this contract is, whether this ſhip departed with convoy. A great deal muſt be referred to the uſage of merchants. The government appoints a convoy for the trade, and names a place of rendezvous. Then, by the uſage of the trade, the voyage begins at *Kingſton*; but the convoy only commences at *Bluefields*; and, by the ſame uſage, the warranty does not require convoy to *Bluefields*. Amongſt merchants, a convoy is underſtood to be, *a naval force, under the command of a perſon appointed by government for that purpoſe*. Admiral *Graves* is appointed to rendezvous with ten ſail of the line at *Bluefields*, and from thence to convoy the trade to *Great Britain*. When they come to the place of rendezvous, they take ſailing orders from the admiral *which are eſſential to ſailing with convoy*; as, by them, they know the ſignals, for what place they are to ſteer, in caſe of diſperſion by ſtorm, or any other cauſe. Admiral *Graves*, on the 26th of *July*, for reaſons beſt known to himſelf, thinks he has got all the ſhips for which he ought to ſtay, and proceeds on his voyage. He leaves no order for the *Glorieux* to follow him to *Cape Antonio*; and though it is true that the Commander in chief may change the place of rendezvous, yet, in this caſe, it is not true, as was ſuppoſed in argument, that *Cape Antonio* was appointed. At the time of ſailing from *Bluefields*, the *Glorieux* was no part of the convoy; for ſhe did not come there till two days after the fleet was gone."—Mr. Juſtice *Buller* delivered his opinion nearly to the ſame effect, except that he did not think ſailing orders *abſolutely* neceſſary. Mr. Juſtice *Willes* was of opinion that, as the convoy had ſailed two days before the proper time, and no *laches* were imputable to the *Admiral*; and as he thought that ſailing orders were not eſſential to convoy, the warranty was ſufficiently performed. (*a*)

Yet

(*a*) It is ſcarcely neceſſary to obſerve, that this opinion of Mr. Juſtice *Willes* is not founded upon any principle known in the

Yet, failing inſtructions are not ſo indiſpenſably neceſſary, but that there may be caſes in which the want of them may be excuſed.

Webb v. *Thompſon*, 1 *Pul.* & *Baſ.* 5.

Yet it would ſeem that failing inſtructions are not ſo indiſpenſably neceſſary that in every caſe they muſt at all events be obtained. Mr. Juſtice *Buller*, in the caſe of *Webb* v. *Thompſon*, ſeems to have drawn the line with great preciſion.—The cauſe had been tried before Lord C. J. *Eyre*; and, upon a motion for a new trial, in his lordſhip's abſence, Mr. Juſtice *Buller* ſaid;—"Had not my Lord C. J. *Eyre* declared that the verdict in this caſe was entirely to his ſatisfaction, I ſhould not decide upon this application in the firſt inſtance. The caſe is here brought to a queſtion of law. *In point of law, then, the general poſition is, that ſailing inſtructions are neceſſary.* I have never decided this point myſelf; but it has often been decided. I do not ſay that there may not be caſes in which they may be diſpenſed with. In *Hibbert* v. *Pigou*, my expreſſion is,—"It is not neceſſary to ſay whether "ſailing orders are eſſential or not. As at preſent ad-"viſed, I do not ſay that they are abſolutely neceſſary." The caſe of *Victorin* v. *Cleeve* goes no further. If the ſhip inſured be at the place of rendezvous within the time appointed for the ſailing of the convoy; but, from any misfortune, from ſtreſs of weather or other circumſtances, the maſter has been abſolutely prevented from obtaining his ſailing inſtructions, and he depart with the convoy; this ſhall be deemed a ſailing with convoy. But then he muſt take the earlieſt opportunity to obtain his ſailing inſtructions. Generally ſpeaking, unleſs ſailing inſtructions are obtained, the warranty is not complied with. The captain cannot anſwer ſignals; he does not know the place of rendezvous in a ſtorm; he does not, in effect, put himſelf under the protection of the convoy, and therefore the underwriters are not benefited."—Mr. Juſtice *Heath* and Mr. Juſtice *Rooke* concurred in this opinion.

In

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the law of inſurance. It might be an apology for the captain's ſailing as he did; and perhaps Admiral *Graves* might have been liable to anſwer for the loſs occaſioned by his leaving the place of rendezvous before the time appointed: But the warranty was not complied with; and nothing will excuſe that non-compliance.

In the following caſe, ſtreſs of weather was held to be a ſufficient excuſe for not obtaining ſailing inſtructions.

Streſs of weather will excuſe the want of them.

An inſurance was made 'from *Gottenburgh* to *London*, 'with a warranty to depart with convoy from *Fleckery*.'— In *July* 1744, the ſhip ſailed from *Gottenburgh* to *Fleckery*, where ſhe waited two months for convoy. On the 21ſt of *September*, at nine in the morning, three men of war, with a large convoy, ſtood off *Fleckery*, and ordered the ſhips there to come out. The ſhip inſured got out by twelve o'clock, and was one of the firſt. The convoy, having ſailed gently on, was two leagues a-head. It was a hard gale, and by ſix in the afternoon, the ſhip came up with the fleet; but could not get to either of the men of war, for ſailing orders, *on account of the gale of wind.* It was ſtormy all night, and at day-break the ſhip was in the midſt of the fleet; but the weather was ſo bad, that no boat could be ſent for ſailing orders. A *French* privateer had ſailed among them all night; and it being foggy the next day, attacked the ſhip, which kept a running fight till dark, which was renewed next morning, when ſhe was taken. In an action on the policy, it was inſiſted, that this ſhip was never under convoy; no ſhip being ever conſidered ſo, till ſhe has received ſailing orders; and if the weather would not permit the captain to get them, he ſhould have gone back. But Lord Chief Juſtice *Lee*, who tried the cauſe, and the jury, were of opinion, that as the captain had done every thing in his power to obtain ſailing orders, it was a departing with convoy.—Theſe agreements, ſaid the Chief Juſtice, are never confined to preciſe words: As in the caſe of departing with convoy from *London*, when the place of rendezvous is at *Spithead*, a loſs in going thither is within the policy. So the plaintiff recovered.

A ſhip joins convoy, but, by ſtreſs of weather, is unable to get ſailing orders; yet it is a departing with convoy.

Victoria v. *Cleeve*, at N.P. 2 *Str.* 1250.

So, where the ſhip inſured had departed from *London*, and, on her arrival in the *Downs*, found the convoy under ſail. The captain ſent one of his men on board for ſailing orders, which were refuſed; but the commodore ſaid, "*Keep on and I will take care of you.*" The ſhip was ſtranded and loſt that night; and the queſtion was, whether ſhe was ever under convoy, not having ſailing orders.

If the convoy be under ſail, and the captain apply for ſailing inſtructions, which are refuſed; but he is ordered to keep on, and he will be taken

care of; this is a ſailing with convoy.

Veedon v. *Wilmot*, at G. H. July, 1744. *Park*, 341.

orders. Lord C. J. *Lee*, who tried the cauſe, held that ſhe was under convoy, and the plaintiff had a verdict.

This caſe can only be ſupported upon the preſumption that it was proved at the trial, that the ſhip was in the *Downs* before the time appointed for the convoy to ſail; and that the captain had done all in his power to obtain ſailing inſtructions. Had the plaintiff failed in either of theſe points, he would have been without excuſe for the want of them. He is bound to be at the place of rendezvous before the time fixed for the ſailing of the convoy; and indeed he ought to be there in time to procure his ſailing inſtructions, when they are delivered out to the other ſhips.

If the captain loſe an opportunity of obtaining ſailing inſtructions before he ſails, he will not comply with the warranty.

The captain is bound to uſe all due diligence to obtain ſailing inſtructions before the departure of the convoy; and if he loſe any opportunity, when it is poſſible for him to obtain them, and depart without them; this will not be a ſailing with convoy, though he keep under the protection of the convoy, and get his ſailing inſtructions as ſoon after ſailing as he can. This will appear in the following caſe.

A ſhip warranted to depart with convoy, comes to the place of rendezvous after the convoy is under way. The captain does not come on board his ſhip till ſome hours after. Had he come on board on her arrival, he might have got ſailing inſtructions before her departure. He ſails with the convoy, but is unable to get his ſailing inſtructions till next day.—This is not a ſailing with convoy within

An inſurance was made on the ſhip *Golden Grove*, "At and from *London*, to all or any of the *Weſt India* iſlands, *Jamaica* and *St. Domingo* excepted; with leave to go to the place of rendezvous to join convoy, and warranted to ſail from thence with convoy for the voyage."—The ſhip having been loſt ſoon after ſhe ſailed from *Portſmouth*, the plaintiff being an underwriter upon the policy, paid 284*l.* 5*s.* to the defendant, the inſured, on account of the loſs. But afterwards, having reaſon to think that the ſhip never received her ſailing inſtructions, and therefore could not have departed with convoy, he brought the preſent action, for money had and received, to recover back the ſum he had thus paid, under a miſtake and in his own wrong.—Upon the trial of the cauſe, it appeared that the ſhip arrived at *Spithead* about nine o'clock in the morning of the 15th of *November* 1795, under the care of the chief mate, the captain being himſelf on ſhore at *Portſmouth*. On the preceding day (the 14th,) ſailing inſtructions were delivered at *Portſmouth* to all ſuch ſhips as applied regularly for them, and the captain of the

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Golden Grove, previous to her arrival, made inquiry concerning ſailing inſtructions, but found they could not be obtained till the ſhip was actually in ſight. On the 15th of *November*, by day-light, the admiral commanding the convoy, got under weigh, but had not entirely quitted the roadſtead until about four o'clock in the afternoon. When he got under ſail, he left the *Trident* frigate to bring up ſuch veſſels as did not weigh anchor with him: About one o'clock on the ſame day the captain came on board the *Golden Grove*, and got under weigh; at which time the *Trident* had alſo got under weigh; and both the admiral's ſhip and the *Trident* had then proceeded ſo far, that it was clear the *Golden Grove* could not overtake the former ſoon enough for the captain to go on board that night, and it was even doubtful whether he could overtake the latter. The next day, between ten and twelve o'clock in the forenoon, the captain of the *Golden Grove*, being then only a quarter of a mile from the admiral's ſhip, went on board her and obtained ſailing inſtructions. Soon afterwards the *Golden Grove*, was loſt, having been, from the time of her departure to that of the loſs, under the protection of the convoy.——Lord *Eldon*, who tried the cauſe, told the jury, that although, under ſome circumſtances, ſailing inſtructions might be diſpenſed with, yet that this did not appear to be a caſe of that kind; that the *Golden Grove* did not appear to him to have departed from the place of rendezvous with convoy, ſince ſhe had either not arrived time enough to obtain ſailing inſtructions; or, if ſhe had arrived time enough, her captain had not uſed the neceſſary endeavours to obtain them before he ſailed.—The jury, under this direction, found a verdict for the plaintiff.—Upon a motion for a new trial, the court, after full conſideration, were unanimouſly of opinion, that there was no principle of law which could be the foundation of a verdict for the defendant, and therefore the plaintiff was entitled to recover.—Lord *Eldon*, in delivering the opinion of the court ſaid,—"It appears to me that if the captain of the *Golden Grove* had been on board his ſhip at nine in the morning when ſhe arrived, he might have obtained ſailing inſtructions from the frigate before he left the place of rendezvous.

the meaning of the warranty.

Anderſon v. *Pitcher*, 2 *Pul. and Beſ.* 164.

In

In point of fact, however, the admiral was under weigh before the *Golden Grove* arrived, and the frigate was under weigh before the captain was on board. It is now too late to say that this warranty is not to be expounded with due regard to the usage of trade. Perhaps it is to be lamented, that in policies of insurance, the parties should not be left to express their own meaning by the terms of the instrument. This seems to have been the opinion of that great Judge Lord C. J. *Holt.* (*a*) It is true, indeed, that Lord *Mansfield* expressed himself thus: "Wherever you render additional words necessary, and multiply them, you also multiply doubts and criticisms." Whether, however, it be not true that as much subtlety is raised by the application of usage to the construction of a contract, as by the introduction of additional words, might, if the matter were *res integra*, be reasonably questioned. If, therefore, the question before us be still undetermined, the inclination of my mind will be to adhere to the letter of the contract; and I feel the more disposed to do so, since it appears most clearly, that no man of the highest experience can ascertain, by any reference to usage, what other interpretation ought to be adopted. It is clear, that sailing instructions are not necessary in all cases: But in general they are essential to departing with convoy; and I do not find any thing in the circumstances of this case which can bring it within any of the exceptions. It is clear that a ship is not bound to obtain sailing instructions at the place of rendezvous *at all events*: The commander of the convoy may refuse them till the fleet is out at sea. But if they can be obtained by due diligence she is bound to obtain them."

This warranty must be expounded with reference to the *usage of trade.*

5. *The ship must depart, and continue with the Convoy till the end of the Voyage, unless separated by necessity.*

If the ship neglect to get under weigh in time, and lose protection, though for the

If the ship insured, by negligence or delay in getting under weigh at the same time with the convoy, lose the

(*a*) Vid. sup. 264, *Lethulier's* case.

the benefit of protection, though for ever ſo ſhort a time; this is not a departing with convoy, and the policy becomes void.

ſhorteſt time; it is a breach of the warranty.

As where the commander of a convoy from *Spithead* made ſignals for ſailing to *St. Helens* overnight, and the next morning, from ſeven o'clock till twelve, made repeated ſignals to get under way; yet one of the convoy did not ſail till two hours after him; in conſequence of which ſhe was captured by a privateer.—This being clearly a breach of the warranty, Lord *Mansfield*, in an action brought on the policy to recover this loſs, nonſuited the plaintiff.

Taylor v. *Woodneſs*, at N. P. Hil. Vac. 4 *G.* III. *Park*, 349.

But by this warranty, the inſured undertakes not only to depart, or to ſail, with convoy, but alſo to do all in her power to continue with ſuch convoy during the voyage, or ſo much of it as is uſual and neceſſary, and not to ſeparate from it unleſs compelled by neceſſity. This is all that the warranty requires, and all that the inſured can abſolutely undertake to do. No man would enter into a warranty to ſail with convoy at all events, during the whole of the voyage, ſo as that both ſhip and convoy ſhall arrive together; becauſe that is often, through ſtreſs of weather, and other cauſes, rendered impoſſible. Therefore, though convoy for the voyage be clearly intended by the uſual warranty, yet, an unavoidable ſeparation is an accident to which the ſhip is liable, and the inſurer ſtill continues reſponſible for any loſs that may happen during ſuch ſeparation.

The ſhip muſt not only depart with convoy, but alſo continue with it, if poſſible, during the voyage.

Thus: A ſhip was inſured, "from *London* to *Naples*, warranted to depart with convoy."—The ſhip did depart from the port of *London*, in company with the convoy, but two days after was ſeparated by a ſtorm. The convoy put into *Torbay*, and the ſhip inſured into *Fowey* in *Cornwall*. Three days afterwards, the wind ſetting right to bring the convoy down the *Channel*, the ſhip ſailed from *Fowey* to meet the convoy; but it did not come, and the ſhip meeting with another ſtorm, was driven on the *French coaſt*, and there taken.—Upon this caſe

A ſhip ſails with the convoy, and is ſeparated by ſtreſs of weather, but does all in her power to rejoin the convoy;—this will not diſcharge the inſurers.

Jeffery v. *Legendra*, 3 *Lev.* 320, S. C. *Carth.* 216, 2 *Salk.* 443, 1 *Show.* 320, 4 *Mod.* 58.

caſe it was decided, upon great conſideration, that the inſured was entitled to recover, there being no neglect or default in the maſter of the ſhip: Having departed with convoy, and done all in his power to keep company with it, this anſwers the words of the policy.—That the meaning of the warranty, *to depart with convoy*, is, that the ſhip ſhall keep company with the convoy during the whole voyage, if poſſible; and, therefore, if the maſter of the ſhip inſured had been guilty of any fraud or neglect after his departure, notwithſtanding he *departed* with convoy, this would have been a breach of the warranty, and the policy would have been diſcharged.

But if the maſter, through fraud or negligence, leave his convoy, it is a breach of the warranty.

If a ſhip, ſeparated from the convoy, neglect to rejoin it, the inſurers are diſcharged.

If a ſhip be ſeparated from the convoy by ſtreſs of weather or any other cauſe, ſhe ought to uſe every endeavour to join it again as ſoon as ſhe is able; but if ſhe neglect to do ſo, the inſurers will be diſcharged.

Before I conclude this branch of the ſubject, it will be proper here to mention the regulations which have been made by a late act of parliament on the ſubject of convoy.

The avidity of gain having often tempted our merchants to riſk their ſhips and goods at ſea, in time of war, without the protection of convoy, and which they were enabled to do at the expenſe of an additional premium to cover the additional riſk, the wiſdom of government perceived the impolicy of ſuffering the continuance of a practice as injurious to our commerce as it was beneficial to the enemy, and therefore an act of parliament has been paſſed for the double purpoſe of compelling ſhips to ſail with convoy, and, by a moderate tax on foreign commerce, to raiſe a revenue ſufficient to defray the extraordinary expenſes of providing a naval force equal to the protection of all our commerce.

By ſtat. 38 *G.* III. c. 76, § 1, No ſhip belonging to his Majeſty's ſubjects (except as hereafter) ſhall ſail from any port without convoy.

By ſtat. 38 *G.* III. c. 76, § 1, it is enacted, 'That 'no ſhip or veſſel belonging to his Majeſty's ſubjects, '(except as therein-after is excepted,) ſhall ſail or depart 'from any port or place whatſoever, unleſs under the

'convoy

'convoy and protection of ſuch ſhip or ſhips as may be 'appointed for that purpoſe.

'That the maſter or other perſon having the charge or 'command of every ſhip or veſſel which ſhall ſail or 'depart under the protection of convoy, ſhall and is 'thereby required to uſe his utmoſt endeavours to con- 'tinue with ſuch convoy during the whole of the voy- 'age, or during ſuch part thereof as ſuch convoy ſhall be 'directed to accompany and protect ſuch ſhip, and ſhall 'not wilfully ſeparate or depart therefrom upon any pre- 'tence whatever, without order or leave for that pur- 'poſe from the officer having the command of ſuch 'convoy.'

§2. The maſter of every ſhip ſailing under convoy, ſhall uſe his utmoſt endeavour to continue with ſuch convoy during the voyage, and ſhall not quit it without leave.

'That if the maſter or commander of any ſhip, 'which is by this act required not to ſail without convoy, 'ſhall ſail without convoy; or having ſailed with convoy, 'ſhall wilfully depart therefrom without leave firſt ob- 'tained from the perſon entruſted with the charge of ſuch 'convoy, every ſuch maſter ſhall forfeit 1000 l. and in 'caſe the whole or any part of the cargo conſiſted of na- 'val or military ſtores, the penalty is 1500 l. with a 'power in the court, where the action may happen to 'be brought, to mitigate the penalties, ſo as they are not 'reduced to a leſs ſum than 50 l. (*a*)

§3. Any maſter of a ſhip ſailing without convoy, or quitting it without leave, ſhall forfeit 1000 l.; and in caſe the cargo conſiſt of naval or military ſtores, 1500 l.

'That in caſe of a ſailing without, or a wilful deſer- 'tion of, convoy, every inſurance, or contract or agree- 'ment for any inſurance, upon ſuch ſhip, or goods, 'wares or merchandize laden thereon, or upon any pro- 'perty,

§4 In caſe of a ſailing without, or deſerting, convoy, the inſurance on the ſhip ſhall be void; and the premium ſhall not be recoverable back from the inſurers.

(*a*) In *France* the puniſhment for quitting convoy was much more ſevere. By an ordinance of 1689, the maſter of a merchant ſhip, ſeparating from his convoy, was condemned to the gallies. This puniſhment, by an ordinance of 1745, was moderated to a fine of 1000 livres, a year's impriſonment, and being declared incapable of ever commanding any veſſel at ſea.—By an ordinance of 1765, the commander of the convoy is directed to give an account to the ſecretary of ſtate for the marine department, of ſuch maſters of merchant ſhips as navigate badly, or delay the convoy. Vid. *Emerig.* tom. 1, p. 167, 443.

'perty, freight, or other intereſt ariſing out of the ſame, 'whereon inſurances may lawfully be made, (and which 'ſhall be the property of the maſter or commander of the 'ſhip, ſo ſailing without convoy, or wilfully quitting 'the ſame, or of any perſon intereſted in ſuch veſſel or 'cargo, who ſhall have directed or been any way privy 'to, or inſtrumental in cauſing ſuch ſhip or veſſel to ſail 'without convoy, or wilfully to ſeparate therefrom,) ſhall 'be null and void to all intents and purpoſes both at 'law and in equity, any contract or agreement to the con-'trary notwithſtanding; and that nothing ſhall be recov-'ered thereon by the inſured for loſs or damage, or 'for the premium, or conſideration in nature of a pre-'mium, which ſhall have been given for ſuch inſurance: 'And if any party to ſuch inſurance, or any broker or 'other perſon ſhall tranſact a ſettlement, or allow any 'money in account, on ſuch inſurance, every ſuch per-'ſon ſhall forfeit 200 l.'

§ 5. Before any ſhip ſhall clear outwards, bond ſhall be given that ſhe ſhall not ſail without, or deſert, convoy.

'That the officers of the cuſtoms ſhall not permit veſ-'ſels to clear outwards, till bond has been given with one 'ſurety, in the penalty of the value of the ſhip, with 'condition that the ſhip ſhall not ſail without, nor wil-'fully deſert, the convoy.

§ 6. This act is not to extend to veſſels not required to be regiſtered, nor having licenſes to ſail without convoy, or going to join convoy, or bound to *Ireland*, or from one port to another in *Great Britain*, or to the ſhips of the *India* or *Hudſon's Bay* companies.

'But this act is not to extend to veſſels, not required 'to be regiſtered by any acts then in force; nor to any 'ſhip having a license ſigned by the Lords of the Admi-'ralty to ſail without convoy, or by ſuch perſons as ſhall be 'duly authorized by them for that purpoſe; or to any ſhip 'proceeding with due diligence to join convoy from the 'port or place of departure, except as to the bond hereby 'required to be taken upon the clearance outwards; or to 'any ſhip bound to or from any port in *Ireland*; or to 'ſhips bound from one port to another in *Great Britain*; 'nor to ſhips in the ſervice of the *Eaſt India* or *Hudſon's* '*Bay* companies.'

§ 8. Nor to ſhips ſailing from foreign ports, where no convoy is appointed.

'That this act is not to extend to ſhips ſailing from 'foreign ports, in caſe no convoy is appointed by the 'Lords of the Amiralty of *England*, or perſons authorized 'by them at ſuch foreign ports to appoint convoys, or to 'grant licenſes for ſailing without convoy.'

'That

'That the Lords of the Admiralty are to give notice 'in the *Gazette* that maſters of ſhips ſhall have on board, 'flags and vanes for the purpoſe of diſtinction, and of 'anſwering ſignals; and without having which they are 'not to be cleared outwards.'

§ 9. Maſters of ſhips ſhall have flags, &c. to anſwer ſignals.

'That ſo much of the ſtat. 33 *G.* III. ch. 66, ſect. 8, 'as makes the maſters of ſhips under convoy liable to be 'articled in the Court of Admiralty, for diſobeying ſig- 'nals or other lawful commands of the commodore, or 'deſerting convoy, and finable at the diſcretion of the 'ſaid court, in any ſum not exceeding 500 l. and puniſh- 'able by impriſonment, not exceeding one year, ſhall be 'painted on a board, and affixed on ſome conſpicuous 'and convenient part of every ſhip which by this act is 'required not to ſail or depart without convoy; and that 'in default thereof, every maſter or other perſon, having 'the charge or command of any ſuch ſhip, ſhall forfeit 'for every ſuch offence, the ſum of 50 l.

§ 10. The clauſe of the 33 *G.* III. c. 66, for puniſhing maſters for deſerting convoy or diſobeying ſignals, ſhall be put up in every ſhip on pain of 50l.

'That if any ſhip, required by this act not to ſail 'without convoy, ſhall be in imminent danger of being 'taken by the enemy, the commander of the ſhip ſhall 'make ſignals by firing guns to convey information of 'his danger to the reſt of the convoy, as well as to the 'ſhips of war under the protection of which he is ſail- 'ing; and that, in caſe he is taken poſſeſſion of, he ſhall 'deſtroy all inſtructions confided to him relating to the 'convoy; and every commander wilfully neglecting to 'make ſuch ſignals, or to deſtroy ſuch inſtructions, ſhall, 'for every ſuch offence, forfeit a ſum not exceeding '100 l.'

§ 11. Ships in danger of being taken ſhall make ſignals, and if taken the maſter ſhall deſtroy his ſailing inſtructions on pain of 100l.

Theſe are the principal clauſes relating to ſailing with convoy, the reſt of the act is employed in fixing the duties, and directing how they ſhall be collected.

The ſixth ſection of this act provides that it ſhall not extend to veſſels *not required to be regiſtered*. A foreign built ſhip, though *Britiſh* owned, is not required to be regiſtered, by any of the regiſter acts, and there an inſurance on ſuch ſhip is good, though ſhe ſail without convoy, and without a licenſe to do ſo. This was determined in the following caſe.

A foreign built ſhip, tho' *Britiſh* owned, is not required to be regiſtered, therefore ſhe may ſail without convoy, without a licenſe to do ſo.

The

A foreign built ſhip, *Britiſh* owned, ſails without convoy, and without a licenſe ſo to do.—The ſhip being within the exception of the 38 *G.* III. c. 76, § 6, a policy on her will be good; and it is not neceſſary to communicate to the underwriters at the time of making the policy, that the ſhip is foreign built.

Long v. *Duff*, and *Long* v. *Bolton*, 2 *Pul.* & *Beſ.* 209.

The ſhip *Lucy* was inſured in ſeveral policies, "At and from *Padſtow* in *Cornwall* to *Leghorn*."—She was *Spaniſh* built and purchaſed at *Hamburgh* by the plaintiff, a *Britiſh* ſubject,—ſhe was not regiſtered, but had paid the alien duties. Previous to her ſailing on the voyage inſured, the captain applied for a licenſe to proceed without convoy to *Leghorn* and *Naples*, but only obtained a licenſe for *Naples*, without convoy, and was captured off that place by a *French* privateer. The only difference between the two caſes was, that in the former it was repreſented to the underwriters, at the time of effecting the policy, that the *Lucy* was a foreign ſhip, and not regiſtered; in the latter, no ſuch repreſentation was made:—It was objected in both actions, that as the licenſe obtained did not extend to the voyage inſured, the *Lucy*, though foreign built, and *Britiſh* owned, was within the proviſions of the ſtat. 38 *G.* III. c. 76, the convoy act, which makes void all policies upon ſhips ſailing without convoy; and in the ſecond, that ſuppoſing her not to be within the proviſions of that act, that circumſtance ought to have been communicated to the underwriters.—Upon the trial it was left to the jury to determine whether, according to the uſage of merchants, it was the duty of the inſured to give this information, or of the underwriter to ſatisfy himſelf upon that point. The jury decided, that it was the buſineſs of the underwriter to obtain this information for himſelf.—Upon motions for new trials in theſe cauſes, the court decided, that it was properly left to the jury to determine this point, and alſo that foreign built ſhips in the hands of *Britiſh* owners, are not required to be regiſtered, and therefore, that the verdicts for the plaintiff muſt ſtand.—Lord *Eldon*, in delivering the opinion of the court, ſaid, "With reſpect to the general point, the queſtion is, whether a veſſel in the ſituation of the *Lucy*, departing without convoy, not having obtained a proper licenſe ſo to do, can be deemed to be protected by the policy, or, whether that policy be not altogether void under the proviſions of the ſtat. 38 *G.* III. c. 76, § 4. (*a*) The policy of

(*a*) Sup. 281.

of this act, as ſtated in the preamble, is, 'that it will 'add to the ſecurity of trade to prevent ſhips ſailing 'without convoy, except in certain caſes.' This will undoubtedly apply to ſhips foreign built. But whether it was intended to be carried to that extent, is the queſtion we are now to decide; and that we muſt do by examining the clauſe which is to carry the principle into effect. The *ſixth* ſection of that act provides that nothing in the act contained, by which ſhips are required not to depart without convoy, ſhall extend to any ſhip or veſſel, *which is not required to be* 'regiſtered by any act or acts of par-'liament in force on or immediately before the paſſing of 'this act.' The true queſtion then, is, whether this ſhip was required to be regiſtered by any ſtatute in force when the convoy act paſſed. She was foreign built, and purchaſed previous to the time when the prohibition took place; and in order to aſcertain whether ſhe, being *Britiſh* owned, is required to be regiſtered, or not, we muſt look back to our navigation laws." His Lordſhip then took a moſt comprehenſive and accurate view of all our navigation laws relating to the regiſtry of ſhipping, down to the laſt regiſter acts, 26 *G.* III. c. 60, and 27 *G.* III. c. 19. He then ſaid,—"After the beſt conſideration which I have been able to give the *regiſter act*, and after converſing with the noble lord who framed it, (*a*) as well as with the learned author of the treatiſe to which it gave riſe, (*b*) the determination I have come to is, that foreign built ſhips, in *Britiſh* ownerſhip, are not required to be regiſtered, and conſequently that this verdict muſt ſtand." His Lordſhip then examined the ſeveral clauſes of the regiſter acts, 26 *G.* III. c. 60, 27 *G.* III. c. 19, and 34 *G.* III. c. 68, and ſaid,—"It is not ſaid that ſhips not regiſtered

(*a*) Lord *Hawkeſbury*, now Earl of *Liverpool*, to whom his country is highly indebted for the many excellent and judicious regulations he has introduced upon this moſt important ſubject.

(*b*) *John Reeves*, Eſq. who has very much promoted the commercial intereſts of *Great Britain* by his valuable hiſtory of the law of ſhipping and navigation.

tered ſhall not be navigated or owned by *Britiſh* ſubjects. A *Britiſh* owner of a foreign built ſhip may engage in neutral trade, and will be liable to the alien duties; but it was not the policy of the legiſlature to prevent *Britiſh* ſubjects from employing foreign ſhips in neutral trade, in as ample a manner as they can be employed by aliens."

Sect. 5.

That the Thing inſured is Neutral Property.

IN treating of this important branch of the law of inſurance, we will conſider, 1ſt. The nature of this warranty; 2dly. When it ſhall be falſified by a *judgment* of condemnation as prize; and, 3dly. What ſhall amount to a forfeiture of neutrality.

1. *The Nature of this Warranty.*

As the premium is meant to be proportioned to the nature of the riſk, and as the general words of the policy, unleſs reſtrained or qualified by ſome ſpecial ſtipulation, ſubject the inſurer to every loſs by capture, it is of great importance, in times of war between maritime ſtates, to aſcertain whether the ſhip or goods meant to be inſured be liable to capture, as belonging to either of the belligerent powers. If the inſured profeſs to be the ſubject of a neutral ſtate and mean to be inſured as ſuch, the inſurer requires him to *warrant* the ſhip or goods to be neutral property. This is done by inſerting in the policy either the words '*warranted neutral*,' or, '*warranted neutral property*;' and ſometimes the warranty is, that they belong to the ſubjects of ſome particular neutral ſtate.

How expreſſed in the policy.

What ſhall be deemed neutral property.

Neutral property, in the ſenſe in which that expreſſion muſt be underſtood in this warranty, is that which belongs to the ſubjects of a ſtate in amity with the belligerent powers.

If

If the warranty be falſe at the time it is made, the policy will be void *ab initio*. But the following caſe ſhews that it is ſufficiently true if the thing inſured be neutral property *at the time when the policy is effected*, the chance of future war being always a riſk within the policy.

It is ſufficient if the warranty be true when made.

A *Dutch* ſhip and cargo were inſured, "At and from "*L'Orient* to *Rotterdam*, both *warranted neutral* pro- "perty:"—The ſhip being captured by an *Engliſh* man of war, an action was brought on the policy; and the declaration ſtated that the defendant ſubſcribed the policy on the 28th of *November* 1780, and averred that the ſhip and cargo were *at that time*, neutral property.—Upon the trial it appeared that the ſhip ſailed from *L'Orient*, on the 11th of *December* 1780, and both ſhip and cargo *were then neutral property*, and ſo continued till the 20th of *December*, when, hoſtilities having commenced between the *Engliſh* and the *Dutch*, the ſhip and cargo ceaſed to be neutral property, were taken on the 25th of *December*, and condemned as lawful prize. —The court, upon this caſe, were clearly of opinion, that the plaintiff was entitled to recover.—Lord *Mansfield* ſaid,—"The inſured warranted the ſhip and cargo neutral property, and the defendant would have the court to add, by conſtruction, "*and ſo ſhall continue during the whole voyage.*" The contract was not ſo. The inſured told the ſtate of the ſhip and goods *then*; and the inſurers took upon themſelves all future events and riſks, from men of war, enemies, detentions of princes, &c. The owners themſelves could not have changed the nature of the property; but they did not mean to run the riſk of the war. If it would have made a difference to what country the property belonged, the underwriters ſhould have inquired. The riſk of future war is undertaken by the inſurer in every policy. The warranty is, that things ſtand ſo at the time, not that they ſhall continue ſo.

A ſhip warranted neutral on the 28th of *November*, ſails on the 11th of *December*. Hoſtilities commence on the 20th *December*, and ſhe is captured on the 25th.—This does not falſify the warranty, and the inſurer is liable.

Edin v. *Parkinſon*, *Doug.* 705. S. P. ruled in *Saloucci* v. *Johnſon*, *Park* 364, and admitted in *Tyſon* v. *Gurney*, 3 T. R. 477.

The chance of future war is always a riſk within the policy.

2. *When*

2. *When this Warranty ſhall be falſified by a Judgment of Condemnation as Prize.*

The uſual evidence to falſify this warranty, or prove a forfeiture of it, is a ſentence of condemnation as prize.

The evidence uſually adduced to falſify this warranty, or to prove a breach or forfeiture of neutrality, which amounts to a breach or forfeiture of the warranty, is the judgment or ſentence of a court of admiralty, or other court having juriſdiction in queſtions of prize, by which the ſhip or goods inſured, and warranted neutral property, have been condemned as prize. Copies of the ſentence and of the other proceedings in the court of admiralty, properly authenticated, are always deemed ſufficient evidence of the fact of the condemnation, and of the grounds upon which it proceeded. A certain comity is ſaid to prevail amongſt civilized ſtates by which the judgments of courts of juſtice, having competent juriſdiction, in any country, are regarded as concluſive upon the ſubject upon which they have been pronounced in the courts of all other countries; and this is ſo binding upon the courts of this kingdom, as we ſhall have occaſion to obſerve hereafter, that foreign deciſions are conſidered as concluſive upon the points decided by them, even when they are manifeſtly unjuſt. (*a*)

The judgments of foreign courts are in general concluſive in ours.

But the *French* pay no regard to the judgments of foreign tribunals.

The courts of juſtice in *France* do not carry their complaiſance ſo far. The judgments of foreign tribunals have there no weight or authority whatever againſt *Frenchmen*; and the cauſe muſt be again decided in their courts. (*b*)

Yet a ſentence, to be binding *England*, muſt be the ſentence of a court of competent juriſdiction.

But in order that a foreign ſentence may be received in our courts as admiſſible evidence, and poſſeſs the authority aſcribed to it, the court in which it was pronounced

(*a*) Vid. Lord *Kenyon's* judgment in *Geyer* v. *Aguilar*, inf. 297. —(*b*) "Les jugemens rendus par les tribunaux étrangers, ne ſont en *France* d'aucun poids contre les *Francois*. Il faut que la cauſe y ſoit de nouveau décidée.—D'ou il ſuit que le jugement de confiſcation, prononcé par un tribunal ennemi, n'eſt ni une preuve que le véritable *pour compte* ait été caché, ni un titre que les aſſureurs puiſſent alléguer pour ſe diſpenſer de payer la perte. Telle eſt notre juriſprudence." *Emerig.* tom. 1. p. 458.

nounced muſt appear to have been a court lawfully conſtituted, and of competent juriſdiction in ſuch matters. And therefore, if it appear to have been held under any uſurped or illegal authority, or contrary to the law of nations, the ſentence will have no validity.

The ſentence of a conſul of a belligerent power, *reſident in a neutral ſtate*, has no authority in our courts.

This was determined by a very eminent and learned judge of our court of admiralty, (*a*) on the 16th of *January* 1800, in the caſe of the ſhip *Flad Owen*, which had been captured by the *French*, carried into *Bergen* in *Norway*, condemned by the reſident conſul there, and purchaſed by a *Daniſh* ſubject. One queſtion before the court of admiralty was, whether a ſale under ſuch a ſentence of condemnation would transfer the property to the neutral vendee. Upon this point the learned judge declared that ſentences of condemnation always appeared to be the ſentences of courts acting, and exerciſing their judicial functions, *in* the belligerent country; and that this was the very firſt attempt that had ever been made to impoſe upon the court a ſentence of a tribunal not exiſting in the belligerent country, but of a perſon pretending to be authorized within the dominions of a neutral ſovereign: That, even if it could be ſhewn that, upon mere ſpeculative principles, ſuch a condemnation ought to be deemed ſufficient, that would not be enough. It ought to be ſhewn that it was agreeable to the uſage and practice of nations; 'and when I am told,' ſaid he, 'that, before the preſent war, no ſentence of 'this kind was ever produced in the annals of man-'kind, and that it is produced by one nation only in 'this war, I require nothing more to ſatisfy me that it is the 'duty of this court to reject ſuch a ſentence as inadmiſ-'ſible.'

This deciſion of the court of admiralty, and the reaſons on which it was founded, has been ſince fully approved and adopted by the court of King's Bench in the caſe of *Havilock* v. *Rockwood*, (*b*) which will be more particularly noticed hereafter. For the preſent it will be ſufficient

(*a*) Sir *William Scott*.—(*b*) 8 T. R. 268. inf. c. 14, § 3.

ſufficient to ſtate that it was there determined, that a condemnation by the *French* conſul at *Bergen* in *Norway* had not the effect of diveſting the property of a captured ſhip out of the original owner.

In what caſes ſuch ſentences ſhall be deemed concluſive evidence to falſify, or prove the forfeiture of the warranty, has been often found to be a very perplexing queſtion, and has produced much litigation and many deciſions, which are not eaſily reconciled, or reducible to any well defined principle.

Where the ground of condemnation is declared to be that the thing inſured was enemy's property, it is always concluſive.

One thing, however, is clear and indiſputable, that if it be adjudged that the ſhip or goods inſured were enemy's property, and this appear on the face of the ſentence, to have been the ground of the condemnation, the ſentence is concluſive evidence to falſify the warranty.

A ſentence of condemation on the ground that the ſhip is *not neutral* is concluſive, tho' it expreſs no other ground. *Fernandes* v. *Da Coſta*, at N. P. after Hil. 4 G. III. *Beawes* 314.

From the following caſe it will appear that, by our law, if a ſhip be warranted to belong to the ſubjects of a particular neutral power, and ſhe be condemned generally in a court of prize, as not being ſuch; the ſentence will be concluſive evidence to diſprove the warranty, though it expreſs no other ground of condemnation.

In an action on a policy on goods on board a ſhip, which was warranted *Portugueze*, the plaintiff gave colourable evidence that the ſhip was *Portugueze*; but that, being obliged, by the perils of the ſea, to put into a *French* port, the cargo was ſpoiled and the loſs incurred. This was admitted by the defendant, but he alleged that, while the ſhip was in the *French* port, ſhe was libelled againſt, and condemned, as not being *Portugueze*; and to prove this, he produced the ſentence of condemnation, and the confirmation thereof in the courts of prize in *France*, together with an anſwer of the plaintiff to a bill in chancery, wherein he had admitted that the ſhip was condemned as not being *Portugueze*; and he contended, that though the goods were loſt by a different peril from that of being enemy's property, yet, that in fact the ſhip was not *Portugueze*, though warranted ſuch, and this vitiated the policy *ab initio*. This was agreed to be law.—Lord *Mansfield* ſaid, that as the ſentence was general, and did not expreſs the ground of the condemnation,

demnation, attested copies of the *libel* ought, in strictness to have been produced, to shew upon what ground the ship was libelled against: But as the plaintiff, by his answer in chancery, has admitted that the ship was condemned as not being *Portugueze*; this, added to the expression used in the sentence of confirmation, viz. that the ship was condemned in the *court of prizes*, amounts to sufficient evidence to proceed upon; and thereupon the defendant had a verdict.

If the ground of the sentence do not appear on the face of it, other evidence may be resorted to in order to shew the ground.

Lord *Mansfield*, in the above case, seems to have thought that where it does not appear on the face of the sentence, that the condemnation proceeded on the ground of the thing insured being enemy's property, other evidence ought to be resorted to, in order to have that ascertained. But in the following case, it was determined that where a ship is condemned generally *as good prize*, and no special ground appears on the face of the sentence, the sentence is conclusive evidence that the property was not neutral.

Even a sentence of condemnation generally *as prize*, is conclusive.

Goods were insured on board the *Thetis*, a *Tuscan* ship, *warranted neutral*.—The ship was taken and carried into *Spain*, and there condemned as *good and lawful prize*; but the sentence stated *no ground* upon which it proceeded. This sentence was appealed from and reversed, but upon a farther appeal, the latter sentence was reversed and the former confirmed.—In an action on the policy, Lord *Mansfield*, upon the trial, was of opinion that the sentence of the *Spanish* court of admiralty was conclusive evidence to falsify the warranty; and nonsuited the plaintiff.—This decision, upon a motion to set aside the nonsuit, was confirmed by the whole court.—Lord *Mansfield* said,—"The warranty is, that the goods are neutral. It must be presumed, from the condemnation, as no other cause appears, that it proceeded on the ground of their being *enemy's property*. In the case of *Bernardi* v. *Motteux*, (a) the decision turned on the particular ground of the condemnation appearing on the face of the sentence, which shewed that it was not that of

A sentence only condemning as lawful prize, without stating any ground, is conclusive against the warranty.

Saloucci v. *Woodmess*, B. R. Hil. 24 G. III. M. S. S. C. *Park* 361.

(a) Post. 295.

of being the enemy's property; and for this reaſon the plaintiff was permitted to ſhew by evidence that the ſpecific ground was really the cauſe of the condemnation. The counſel admitted the general rule, but at the trial ſaid, that the ſpecial cauſe would appear upon the proceedings, if they could be had. The proceedings are now here, and ſhew that the queſtion turned entirely upon the property of the goods; for the ſecond court decreed that *the goods were free*, but the laſt court reverſed that decree. It is ſufficient, however, that no ſpecial ground is ſtated."

But if the ſpecial ground ſtated in the ſentence do not prove that the thing inſured was not neutral, the ſentence will not be concluſive.

Although Lord *Mansfield*, in this caſe, nonſuited the plaintiff on the bare production of the ſentence; yet, in delivering his opinion upon the argument, he lays ſo much ſtreſs on the proceedings then produced, not ſtating a ſpecial ground of condemnation, that it may be fairly inferred, that if ſuch a ground had appeared, which did not diſtinctly falſify the warranty, the nonſuit would have been ſet aſide.

This idea is confirmed by a ſubſequent deciſion in the caſe of *Saloucci* v. *Johnſon*, which we ſhall preſently have occaſion to cite at large. (*a*) That was an action on another policy on the ſame ſhip *Thetis*, for the ſame voyage, warranted a neutral ſhip; and it appearing upon the face of the ſentence that the ground of condemnation was the ſhip's refuſal to be ſearched, and reſiſting with force, the court deeming ſuch reſiſtance juſtifiable, determined that the ſentence did not falſify the warranty.

If the ſpecial ground ſet forth in the ſentence do not neceſſarily falſify the warranty, the court may inquire into its truth.

In a more recent caſe the ſame queſtion aroſe, and the court of *King's Bench* determined, that where the ſpecial grounds of condemnation ſet forth in the ſentence do not neceſſarily negative the warranty, the court may receive evidence to prove the truth of it.

Goods warranted *American* were inſured from *London* to *Virginia*; and a foreign court, after reciting that "the true

That was an inſurance on the goods and private adventure of the captain, warranted *American* property, on board the ſhip *Friends*, "At and from *London* to *Virginia*."—In an action on the policy, it appeared upon the trial, that the property of the goods was in the plaintiff who was an *American*; that the ſhip was *American* built,

(*a*) Vid. inf. 301.

built, and manned by *American* ſailors; had been conſigned by the owners in *Virginia* to their correſpondents in *London*, upon the voyage inſured, having all neceſſary papers on board to ſhew that ſhe was an *American* ſhip; and, that the real place of her deſtination was *Norfolk* in *Virginia*, to which port ſhe belonged; that, in the courſe of her voyage, having met with tempeſtuous weather, and being much damaged, ſhe was obliged, from diſtreſs, to bear away to ſome port in the *Weſt Indies*, in which courſe ſhe was captured by a *French* privateer, and carried into *Guadaloupe*, where ſhe was condemned by a ſentence of the court of commerce there, expreſſed, as to the matter in judgment, in theſe terms: "Foraſ-"much as the true deſtination of the ſaid veſſel was "for the *Engliſh* iſlands, having been hired and loaded "at *London*, and that there have been found on board "her eighty barrels of gunpowder; (*a*) the court declares "the ſaid brig *Friends* a good prize for the benefit of "the captors, together with her tackle, apparel, cargo, "and generally all that belongs to her, &c."—A verdict was taken for the plaintiff, with liberty to the defendant to move to ſet it aſide and enter a nonſuit.—Upon that motion the court were clearly of opinion, that the ſentence was not concluſive evidence to falſify the warranty; and that therefore the plaintiff was entitled to recover.—Lord *Kenyon* ſaid,—"That the juſtice and honeſty of the caſe are with the plaintiff is beyond all doubt, and that the ſhip was *American*, and the goods the property of an *American*, is equally clear. But it is contended that though, in point of fact, this be true, yet the ſentence of condemnation precludes the plaintiff from aſſerting it. I yield to the caſes cited which ſhew that, to a certain degree, this court will ſupport the proceedings in foreign courts by preſuming that their ſentences are juſt; and I will not make any exception, at preſent, of the proceedings of the *French* courts of admiralty. (*b*)

"deſtination of "the ſhip was "to the *Britiſh* "*Weſt Indies*, "having been "hired and "loaded at "*London*, and "having on "board 80 bar-"rels of gun-"powder," declares the ſhip and cargo good prize. This ſentence is not concluſive evidence againſt the warranty; and the court here may receive evidence to prove the truth of it.

Calvert v. *Bovil*, 7 T. R. 523.

(*a*) This was part of the captain's adventure, the reſt conſiſting of ſlops, porter, cheeſe, and ſhip chandlery.—(*b*) *Guadaloupe* was then under the government of the *French Executive Directory*.

But when an attempt is made to pervert the juſtice of the caſe; it becomes neceſſary for us to ſee whether the deciſion of the court at *Guadaloupe* has ſo determined on the fact of neutrality, that we cannot examine into it. It has been ſaid that, nothing can juſtify the ſentence of the *French* court of admiralty, but the fact that this was *Britiſh* property. But that is a concluſion againſt all the facts proved in the caſe. If, indeed, that court had ſtated in their ſentence, that they condemned the goods, becauſe they were *Britiſh* property, I ſhould have conſidered myſelf bound by their ſentence. But they have themſelves aſſigned other reaſons for their adjudication. The expreſs grounds of the ſentence are, that the ſhip was deſtined for one of the *Weſt India* iſlands, that ſhe was hired and loaded at *London*, and that ſhe had a certain quantity of gunpowder on board; *therefore*, they condemned her and her cargo as good prize. Then it is impoſſible for us to conclude that the *French* court decided on the ground that this was *Britiſh* property, when all the evidence in the cauſe, and the reaſons expreſsly given by them for their judgment, lead to a contrary concluſion."—Mr. Juſtice *Lawrence* ſaid, that the caſes alluded to in the argument ſeemed to have eſtabliſhed this, that if it can be collected from the ſentence itſelf, on what ground the foreign court decided, that would be concluſive in any action brought in this country: But that if it were ambiguous, or did not ſhew on the face of it, on what ground they proceeded, then the court here might receive evidence to ſhew what were the grounds of the deciſion abroad.

If the ſentence be ambiguous, it will not be concluſive.

From the following caſe it will appear that if the ſentence be ambiguous, and there be reaſon to ſuppoſe that it proceeded on a different ground from that of enemy's property, it will not be concluſive evidence to falſify the warranty.

The ſentence of a *French* court of admiralty ſtated, 'that the captured ſhip was 'on her

An inſurance was made upon freight and goods, "At "and from *Venice to London*, *warranted neutral ſhip and* "*neutral property*."—The ſhip on her voyage was taken by a *French* frigate and condemned. Upon the trial, the plaintiff

plaintiff offered to prove that both ſhip and cargo were neutral; and that the ſhip's papers fell overboard by accident, after ſhe was brought to by the *French* frigate. But the defendant objected to this evidence, and produced an atteſted copy of the ſentence of condemnation of the *French* admiralty court, as concluſive evidence to ſhew that the ſhip and cargo were not neutral property. This ſentence, after ſtating from the *procés verbal*, made when the ſhip was taken, the capture of the ſhip, and the endeavour of the captain to avoid coming on board the frigate with the ſhip's papers, ſtated, "that the cap- "tain being at laſt obliged to comply, upon threats being "made of firing on him, and being come on board, he "declared that, *in getting up the ſhip's ſide, the box contain-* "*ing his muſter-roll, his patents, and paſſport, had fallen* "*from his pocket into the ſea, and only ſhewed his bills of* "*lading*, by which it appeared that the ſhip, commanded "by a *Venetian*, ſailed from *Venice* with a cargo of ſilk, "raiſins, oil, &c. *for the account of ſundry perſons in Ve-* "*nice, conſigned to ſundry perſons in* London. That theſe "goods *going to an enemy's country, and the loſs of his* "*papers raiſing ſuſpicions*, the ſhip was ſtopped and ſent "into *Almeiria*." The ſentence then ſtates that, "*Theſe* "*premiſes being conſidered*, the ſhip and cargo are declared "good prize, and adjudged to the captors."—The queſtion, upon this caſe was, whether the above ſentence was concluſive to falſify the warranty. In the courſe of the argument, an *arrêt* for the regulation of the *French* marine, dated the 26th of *July* 1778, and the *procés verbal* made at the time of the capture, though not proved at the trial, or ſtated in the caſe, were much referred to. By this *arrêt*, art. 3. "All veſſels with their cargoes, "whether neutral or allied, from which *any papers* have "been thrown into the ſea, ſuppreſſed or abſtracted, "ſhall be declared good prize, upon proof that *ſome pa-* "*pers* have been thrown into the ſea, without inquiring "what thoſe papers were, or by whom thrown; and "though ſufficient remain to prove that the ſhip and "cargo belonged to friends or allies." In the *procés verbal* it was expreſsly ſtated, "that the ſhip going to "an enemy's country, and the loſs of her papers, by "falling

'voyage to an 'enemy's port, 'with goods 'conſigned to 'perſons there, 'tho' ſtated in 'the bills of 'lading to be- 'long to neu- 'trals, and 'there being '*reaſon to ſuſ-* '*pect* that the 'captain had 'thrown his 'papers over- 'board, there- 'fore the ſhip 'and cargo are 'condemned 'as prize.' This being ambiguous, and there appearing reaſon to ſuppoſe that the ground of the ſentence was the throwing the papers overboard, contrary to a *French* ordinance, this was held not to be concluſive evidence to falſify the warranty.

Bernardi v. *Motteux*, Doug. 554.

"falling into the ſea, raiſing ſuſpicions, ſhe was ſtopped "*in conſequence of the third article of the regulation of the* "*26th of July*, 1778, *concerning neutral ſhips.*"—Upon this caſe it was contended on the part of the plaintiff, that the condemnation was not founded on any proof that the property was not neutral, but on the authority of the *arrêt*, on account of the papers having been thrown into the ſea. If this had been done wilfully it would have been fraud, or barratry, in the maſter, which was one of the riſks inſured againſt; but it was no evidence of enemy's property.—For the defendant it was inſiſted that, though the ſentence did not, in words, declare the ſhip and cargo to have been condemned, *as enemy's property*, which it is not the practice to do; yet that that appeared, from neceſſary inference, to have been the ground of the condemnation; and throwing the papers into the ſea *was only evidence* of that fact.—Mr. Juſtice *Buller* being of opinion that, *on the caſe, as ſtated, without the procés verbal*, the interpretation of the ſentence was, that the condemnation went on the ground of *enemy's property*, it was propoſed to the defendant to agree that the *procés verbal* ſhould be made part of the caſe, which would explain the ambiguity of the ſentence; by ſhewing the *arrêt* to have been the ground of the capture. This was refuſed by the defendant.—Lord *Mansfield* was of opinion, however, that the juſtice of the caſe might ſtill be got at, on the ground of the ambiguity of the ſentence, which did not mention a word of *enemy's property*; that it was clear the *French* admiralty meant to proceed on the ground of *throwing the papers overboard*; and that the *procés verbal* ought to be conſidered as part of the proceedings, and that the ſentence ought not to have been read without it.—It being alleged by the defendant's counſel, that it would be dangerous to open the ſentences of foreign courts of admiralty, which are uſually informal; and that the conſequence of this deciſion would be that, in all caſes of this ſort, there would be controverſies about the ground of the foreign ſentence, Lord *Mansfield* ſaid that this ſuppoſed inconvenience would be entirely

entirely obviated if the foreign courts would ſay, in their ſentences, "*Condemned as enemy's property.*"—Mr. Juſtice *Willes* and Mr. Juſtice *Aſhurſt* concurred with Lord *Mansfield*, and there was a judgment for the plaintiff, Mr. Juſtice *Buller* ſtill adhering to his former opinion.

But a ſentence of condemnation as enemy's property is concluſive, though manifeſtly unjuſt.

But ſo great, in our courts, is the authority of the ſentence of a foreign court of admiralty, that if it be there decided that a ſhip or goods are enemy's property, ſuch ſentence, though manifeſtly unjuſt, will be received as concluſive evidence to diſprove the warranty of neutral property. In the following caſe this point was, upon full conſideration, ſolemnly ſettled.

A ſhip warranted *American* was condemned as enemy's property, for not having on board a liſt of the crew, ſuch as is required by a marine ordonance of *France*, and adjudged by the court there to be requiſite within the meaning of the treaty of commerce between *France* and *America*. The ſentence is concluſive evidence againſt the warranty, though in fact the ſhip and cargo were *American* property.

An inſurance was made on the freight of the ſhip *Rainbow*, "At and from *Charleſtown* to *London*, *warranted American property.*" In an action on this policy, brought to recover a total loſs by capture, it appeared on the trial, that the plaintiff, who reſided at *Charleſtown*, was the ſole owner of the ſhip, which took in a cargo at that place upon freight for the voyage deſcribed in the policy; that ſhe ſailed on this voyage under the command of *William Smith*, a naturalized ſubject of the *United States*, on the 18th of *January* 1796; and on the 25th of *March* 1797 was captured by a *French* privateer, carried into *Nantz*, and there condemned and ſold: That, at the time of her ſailing and till the capture, ſhe had on board a proper regiſter as an *American*-built veſſel, a paſſport or ſea-brief duly certified, and the ſeveral other documents referred to in the ſentences of condemnation; but ſhe had no certified *role d'équipage* or liſt of her crew. The plaintiff offered to prove that he was born within the *United States*, and was domiciled there from his birth, and that the ſhip and freight were his ſole property.—On the other hand there was produced a ſentence of condemnation by the commercial tribunal at *Nantz*, which, after ſtating at great length the mutual allegations of the parties, concludes to the following effect; 'Conſidering that the decree of the *Executive Directory*, 'of the 12th *Ventoſe* laſt, declares lawful prize all *Amer-* 'ican ſhips not having a liſt of their crews, conformably 'to the model annexed to the treaty of *February* 1778 'between

Geyer v. *Aguilar*, 7 T.R. 631.

'between *France* and *America*, and that there was not 'on board the *Rainbow* ſuch a liſt of the crew, but only 'a ſea letter, on the back of which was an agreement 'ſubſcribed by only ſeven of the crew; and that the 'captain produced only bills of lading without ſignature, '—the tribunal therefore adjudges the validity of the 'capture and confiſcation of the ſhip and cargo, *the 'whole being for want of captain Smith's having the papers 'in due form, decreed to belong to the enemies of the republic*, '&c.'—This ſentence, upon appeal to the tribunal of the department, was confirmed, and the appellant condemned to pay coſts.—The ordinance of *October* 1744 was produced, declaring all ſhips prize which ſhould have on board any officer, a ſubject of the enemy's country; or which ſhould not have on board a muſter-roll of the crew ſtated by the public officer of the neutral port of departure. The treaty of *February* 1778 between *France* and the *United States* was alſo produced, the 12th, 25th, and 27th articles of which require that, when either power is at war, the ſhips of the other ſhall be obliged to carry paſſports, and certificates to ſhew that the goods on board are not contraband; alſo a liſt of the crew, containing their names, places of birth and abode.—It was admitted that, previous to the capture of this and other ſhips for want of the *role d'équipage*, no ſuch roll had ever been deemed neceſſary; but that, ſince then, they have been in uſe.—The queſtion, upon this caſe was, whether the ſentences of condemnation, connected with the treaty, the *French* ordinances and decrees, were to be deemed concluſive againſt the truth of the warranty.—The court determined, that as the *French* court had concluded, from the evidence, that this was *enemy's property*, and as that judgment was binding upon the courts here, they were obliged to draw the ſame concluſion; and that therefore, as the property warranted to be *American* property, muſt now be taken not to have been ſuch, the plaintiff could not recover.—Lord *Kenyon* ſaid,—"We come to decide this caſe bound and ſhackled by certain rules from which we dare not depart. The acts of pirates are to be treated as the acts of pirates: They do

do not profeſs to have any civil code of laws by which they are to be reſtrained. But civilized nations profeſs to be governed by certain rules; and the comity due from the courts in one country to thoſe of another, induces them to give credit to each other's acts; (*a*) and ſo we muſt continue to act in this country, until the legiſlature ſhall think fit to forbid it. I admit the caſes of *Mayne* v. *Walter*, (*b*) and *Saloucci* v. *Johnſon*, (*c*) up to their extent. I admit that, if a foreign court of admiralty proceed on grounds contrary to the law of nations, its judgments ought not to have weight in the courts of this country. But the ground on which the courts of *France* proceeded in this caſe was, that this was a capture of *enemy's property*; and it certainly is not contrary to the law of nations to condemn a ſhip on that ground. Whether or not thoſe courts arrived at that concluſion by proper means, I am not at liberty to inquire. Here the queſtion is, whether they have not ſtated, as the foundation of the condemnation, a ground which will not bear them out, ſuppoſing it to be true; and I am clearly ſatisfied that they have. They concluded from the evidence that this was enemy's property: not, indeed, in the formal language of our courts of juſtice, but they ſay, in ſubſtance, "We think this is enemy's property, and therefore we "condemn the ſhip and cargo." Now that concludes this caſe; for as long as the foreign judgments are binding upon us, the concluſion that we muſt draw from the judgments of the *French* courts, in this caſe, is, that the property which was warranted to be *American*, is found by thoſe judgments not to have been *American* property. I feel this, however, as the groſſeſt injuſtice towards the *Americans*. The *French* courts ſeem, in this inſtance, to have proceeded on *Algerine*, nay on worſe, principles; becauſe they profeſſed to have proceeded according to law, but in reality made the law a ſtalking-horſe for an act of piracy. But I cannot now queſtion the legality of their deciſion: I am bound to decide according to law. It is my

(*a*) Vid. Sup. 288.—(*b*) Inf. 302.—(*c*) Inf. 301.

my duty *jus dicere, non jus dare.*" The other judges concurred in theſe ſentiments.

The ſentence of a foreign court of admiralty is only concluſive as to the points which it profeſſes to decide.

But though the ſentence of a foreign court of admiralty poſſeſs ſuch great authority in our courts, that it is conſtantly received as concluſive evidence, as to the points which it profeſſes to decide, yet it muſt be obſerved that its authority is confined to thoſe points alone; and nothing but the matters *expreſsly decided* can be taken as incontrovertible. A fact, therefore, recited in ſuch ſentence, though it be a part of the premiſes on which the adjudication is founded, is not conſidered as concluſive.

Chriſtie v. *Secretan*, 8 T. R. 192. inf.

Thus: In an action on a policy on goods on board an *American* ſhip, it appeared that the ſhip had been condemned as prize by a *French* court of admiralty, becauſe, as the ſentence expreſſed it, ſhe was *looked upon* as belonging to the enemies of the *French* republic. Many reaſons were aſſigned in the ſentence for this deciſion, particularly that the ſhip's ſea papers were not in the regular order for an *American* ſhip. It was objected that the ſhip being an *American*, though not warranted neutral, ought to have ſailed with all the documents neceſſary to ſuch a ſhip, and the want of any of theſe avoided the contract.—But the court ſaid that, though they were bound to conſider the ſentence as concluſive, as to the *point decided* in it, namely, *that the ſhip was enemy's property*; yet as it did not *decide* that ſhe had not the neceſſary documents for an *American* ſhip, but only recited that, as one *reaſon* for the ſentence, they held that the plaintiff was entitled to recover.

3. *What ſhall amount to a forfeiture of Neutrality.*

This warranty muſt not only be true at the time when the policy is effected, but the inſured ſhould take care that he do not, by any act or omiſſion on his part, forfeit his neutrality. Such forfeiture, by the wilful act of the maſter or mariners, though in ſome inſtances it may amount to barratry, is a breach of the warranty, and avoids the policy from the time it is committed; nor can

can the insured recover upon it for any loss happening afterwards, though it proceed from a cause wholly unconnected with the warranty. (*a*) For it is of little importance to the insurer whether a ship be liable to capture, as being enemy's property, or for having forfeited her neutrality.

A ship may forfeit her neutrality by any act done or attempted against the law of nations, or in contravention of particular treaties, and injurious to either of the belligerent powers.

What act shall be of this description, and amount to a forfeiture of neutrality, is frequently a question of much doubt and difficulty.

The causes of the forfeiture of neutrality are generally, *first*, the resisting of visitation and search; and, *secondly*, sailing without proper documents, and acting in contravention of particular treaties. Of these in their order.

First, Of the forfeiture of neutrality *by resisting visitation and search.*

The most frequent cause of dispute upon this subject is the refusal of neutral ships to submit to visitation and search by belligerent cruisers. It has been holden that a neutral is not bound to submit to such search; and that searching, being an act of superior force, rather than the exercise of a right, the neutral may always resist it, when he can do so with effect; and that such resistance is therefore no cause of forfeiture of neutrality.

It has been holden that a neutral is not obliged to submit to a search; but may lawfully resist it with force.

That was the case of an insurance on the ship *Thetis*, belonging to *Tuscan* subjects resident at *Leghorn*, on a voyage from *Leghorn* to *London*.—The ship, having *neutral goods* on board consigned to *London*, was captured, carried into *Spain*, and there condemned as lawful prize. The sentence of condemnation was appealed from by the captain and reversed; but afterwards confirmed upon a further appeal by the captors. Two grounds of condemnation

Salvucci v. *Johnson*, B. R. Hil. 25 G. III. MS. 8 C. *Park* 363.

(*a*) R. *Woolmer* v. *Muilman*, 4 *Bur.* 1419, 1 *Bl.* 427.

nation appeared in the ſentence. 1ſt. That the ſhip refuſed to be ſearched, and reſiſted with force, having fired at the *Spaniſh* ſhip; 2dly, that ſhe had no charter-party on board; *both contrary to the Spaniſh cruiſing orders.* To theſe the captain anſwered, 1ſt. That he reſiſted and fired, becauſe the *Spaniards* had hailed him under falſe colours, whereby he took her for a *Barbary* corſair; 2dly, that the *Thetis* was a general ſhip, and he had taken the goods on board by the bale or piece, and had not freighted the ſhip to any individual; in which caſe a *manifeſt* was ſufficient, without a charter-party. The ſentence of the laſt court of appeal *admitted the ſhip to be neutral,* by ſtating her to be a *Tuſcan* ſhip.—Upon this caſe, the court (*a*) were clearly of opinion that the plaintiff was entitled to recover, and gave judgment accordingly.—In the argument, the defendant's counſel gave up the ſecond ground of condemnation, as untenable.—Upon the firſt, the judges agreed that a ſhip, warranted neutral, muſt ſo conduct herſelf as not to forfeit her neutrality; and that if, by the wilful act of the captain, ſhe do this, to the injury of the owners, it will amount to the offence of barratry: But in this caſe, nothing of that kind was imputable to him. That *a neutral ſhip is not bound to ſubmit to be ſearched,* ſearching being an act of ſuperior force, rather than the exerciſe of a right, which may always be reſiſted when the party is able; and the ſearcher who acts at his peril, always pays coſts, unleſs he finds ſomething on board to juſtify him, like the caſe of cuſtom-houſe officers: That this was confirmed by the practice of the admiralty, where coſts are always given in caſes of improper detention, which would not be done if neutral ſhips were liable, at all events, to be ſtopped: That, in the preſent caſe, there was nothing to juſtify the ſearch, the cargo being neutral: That a ſhip is only bound to take notice of the laws of the countries from which, and to which, ſhe ſails; but not the particular ordinances of other

(*a*) Viz. *Willes*, *Aſhurſt*, and *Buller*, Js. Lord *Mansfield* being abſent.

other powers; and that a detention, therefore, under the authority of particular ordinances which do not make a part of the law of nations, was a risk within the policy."

Observations on this case.

The ground of this decision seems to have been that, as the capture and condemnation of the ship insured were only warranted by the particular ordinances of the *Spanish* government, the sentence was no evidence to prove that the ship had forfeited her neutrality.

What the particular ordinances alluded to were, does not appear. The sentence stated that the ship had refused to submit to a search, and had resisted with force, *contrary to the Spanish cruising orders*. If those cruising orders directed that a neutral ship which should resist a search should be seized and confiscated, the question would then have been, whether such orders were warranted by the law of nations; for if they were, the resistance was a forfeiture of neutrality, and a just ground of capture and confiscation.

But it has since been holden that a resistance to search is a breach of neutrality.

That the law of nations does give to every belligerent cruiser the right of visitation and search, and that a resistance to such search amounts to a forfeiture of neutrality, seems to have been the opinion of the same court in the following more recent case.

A court of admiralty condemns a ship and cargo, because the master and crew had forcibly rescued the ship from a prize-master sent with her into port by a belligerent cruiser, for the purpose of search:—This is a breach of the ship's neutrality, and conclusively proved by the sentence of a court of admiralty condemn-

That was the case of an insurance on goods on board the *Dispatch*, "At and from the island of *St. Thomas* to "the *Havannah*; the ship and goods warranted *Danish* "property."—In an action on this policy, to recover a total loss by capture, it appeared,—That the ship and goods insured were the property of *Danish* subjects resident at the *Danish* island of *St. Thomas*, and that, when the ship sailed on the voyage insured, she had on board all the ship's papers usually carried by *Danish* ships: That the ship was captured by the *Pelican*, an *English* man of war, and condemned by a sentence of the *British* vice-admiralty court at *St. Domingo*, which stated, 'That the 'said neutral ship *Dispatch*, with the cargo on board, 'being *Danish* property, had been, under the law of na-'tions and of war, and agreeably to existing treaties, 'stopped and detained by the captain of the *Pelican*, and 'sent

ing her upon that ground.

Garrels v. *Kenſington*, 8 T. R 23.

'ſent by him to the port of *Mole St. Nicholas*, for the 'purpoſe of being legally examined, under the command 'of a midſhipman, as prize-maſter, with two ſeamen: 'That, on the near approach of the ſaid ſhip to that 'port, the maſter and crew of the *Diſpatch*, had, *in di-* '*rect violation and breach of their neutrality, as* Daniſh *ſub-* '*jects, and contrary to the law of nations, and the faith of* '*treaties*, violently and forcibly, at a preconcerted ſignal, 'ſeized and taken poſſeſſion of the ſaid ſhip and cargo 'from the ſaid prize-maſter and ſeamen, and had re- 'tained poſſeſſion thereof till again captured by a *French* 'privateer; and that ſhe was afterwards recaptured by 'the *Pelican*.' The judge then, after ſtating his reaſons at large, adjudges and decrees the ſhip and cargo to be lawful prize, &c.—On the part of the plaintiff it was contended, that the ſentence did not negative that the ſhip and cargo were originally neutral; but only ſtated facts from which the court concluded that ſhe afterwards forfeited her neutrality; and that theſe facts, when examined, would not warrant that concluſion, *Daniſh* ſhips not being bound, by any treaties with *England*, to ſubmit to be ſearched, much leſs to be violently taken poſſeſſion of, and carried out of the courſe of their voyage for that purpoſe; and that, by the law of nations, a neutral ſhip was not bound to ſubmit to be ſearched, according to the deciſion in the caſe of *Saloucci* v. *Johnſon*. (*a*) But the court decided that the ſentence was concluſive evidence that the ſhip had been guilty of a breach of her neutrality, and that, therefore, the plaintiff was not entitled to recover.—Lord *Kenyon* ſaid,—"The caſe of *Saloucci* v. *Johnſon*,

(*a*) Sup. 301.—Another point was made by the plaintiff's counſel, viz. that even if ſuch a right of ſearch did exiſt, the act of the captain and crew in reſiſting it would at moſt amount to barratry, for which the underwriter would be liable. But this was anſwered by ſhewing that there was no count in the declaration for a loſs by barratry.

Johnſon, profeſſed, at laſt, to proceed on this ground, that the arbitrary ordinances of one country ought not to conclude the rights of the ſubjects of another; and that courts of juſtice ought to proceed on the acknowledged law of nations, and on the exiſting treaties between the different ſtates. That caſe ſays that a ſhip, which is warranted neutral, muſt be ſo conducted as not to forfeit her neutrality. But was this ſhip ſo conducted? The ſentence of the court of admiralty, which we cannot review, has expreſsly ſtated, "that the maſter and "crew of the *Diſpatch*, in direct violation and breach of "their neutrality, as *Daniſh* ſubjects, and contrary to "the law of nations and the faith of treaties, violently "ſeized and took poſſeſſion, &c." If we had conſtituted that court, perhaps we might have drawn a different concluſion from the facts there ſtated: But we are now concluded by that ſentence. Therefore, without contradicting the caſe of *Saloucci* v. *Johnſon*, I think the defendant is entitled to our judgment. With regard to the queſtion concerning the right of ſearching neutrals: Before the late armed neutrality, it was conſidered in this country, and ſo decided in many caſes, that the right of ſearching neutrals is part of the law of nations; and it was ſuppoſed to be founded in reaſon."—Mr. Juſtice *Lawrence* ſaid,—"The argument founded on the caſe of *Saloucci* v. *Johnſon* proceeds on a ſuppoſition, that a point was there decided, which, in fact, was not decided: It was not there determined that this court can review the ſentence of a court of admiralty, adjudging that a ſhip had forfeited her neutrality; (*a*) for it was not there adjudged by

(*a*) The point there determined was, in ſubſtance, that the ſhip was juſtified in reſiſting a ſearch, and that the ſentence of the *Spaniſh* court of admiralty, being founded on the particular ordinances of that country, which made no part of the law of nations, was not concluſive to prove the legality of the capture.—If the ſhip did in fact forfeit her neutrality by the law of nations, the ſentence was well founded; and its being ſtated in the ſentence that this reſiſtance was contrary to the *Spaniſh* ordinances does not deſtroy its validity, if warranted by the law of nations.

by the court of admiralty that the ſhip had forfeited her neutrality. But looking into the grounds of this ſentence, we cannot but ſee that the ſhip was condemned for having violated her neutrality, and acted contrary to the law of nations and the faith of treaties."

The queſtion, as to the right of viſitation and ſearch, and the conſequences of reſiſting, conſidered.

As oppoſite doctrines have been advanced in theſe two caſes upon a very important queſtion of the law of nations, I think it will not be improper in this place to inquire, whether, according to the practice of paſt times amongſt the maritime ſtates of *Europe*, and the opinions of the perſons moſt eminent for their learning in that law,—*Cruiſers, legally commiſſioned, have a right to viſit and ſearch neutral ſhips at ſea; and whether a reſiſtance to ſuch ſearch amounts to a forfeiture of neutrality.*

Law of nations defined.

It may be proper here to premiſe that the law of nations does not conſiſt of the arbitrary ordinances of particular ſtates, dictated by intereſt, and ſupported only by force; but of thoſe principles and regulations founded in reaſon and general convenience, by which the mutual intercourſe between independent ſtates is every where conducted; and from which none can depart without offending againſt civil ſociety itſelf. What thoſe principles and regulations are, is to be collected from long eſtabliſhed practice amongſt civilized ſtates, which hiſtory has tranſmitted to us, and learned men have reduced to a ſyſtem.

Doctrine of *Hubner*.

M. *Hubner*, in the year 1759, publiſhed his treatiſe, *De la ſaiſie des batimens neutres*, compoſed for the purpoſe of juſtifying the northern powers in ſupplying the *French* with naval ſtores, without interruption from *Great Britain*. It is evidently a party production, more remarkable for its ingenuity, than for candour or fair reaſoning. It propoſes to prove, that *free ſhips make free goods*, that *the flag covers the cargo*, and therefore that *neutral ſhips, acknowledged as ſuch, cannot be ſeized at ſea, though they be laden with contraband of war, or with enemy's goods. (a)*

Two or three authorities, however, will ſuffice to remove all doubt upon this queſtion. In

(a) Vid. *Hubner* de la ſaiſ. des batim. neut. part. 1, c. 8, § 7.

In the *Conſolato del mare*, (*a*) one of the moſt ancient collections of marine laws now extant, it is laid down *firſt*, that if enemy's goods be found on board of neutral ſhips, they may be taken, the captor paying the freighs, and any other claim the captain of the neutral ſhip may have upon them; *ſecondly*, that if neutral goods be found on board of an enemy's ſhip, the ſhip may be taken and the goods reſtored, the owner of them paying the freight. Of the *Conſolato del Mare.*

Grotius, who cites this paſſage, does not afford much ſatisfaction on this queſtion: *Bynkerſhoek*, however, was decidedly of opinion, that belligerent cruiſers were warranted by the law of nations in viſiting neutral ſhips, in order to examine their papers and ſeize enemy's property, if any ſhould be found on board: But he denies that the captor is bound to pay the freight or any other charge to the neutral captain, as laid down in the *Conſolato del mare*. (*b*). *Vattel.* Of *Bynkerſhoek*

(*a*) Ch. 273.—(*b*) After a review of the ſeveral treaties between particular ſtates upon this ſubject, by which it is ſtipulated that *free ſhips ſhall make free goods*, which *Bynkerſhoek* ſays, are only exceptions to the general law, he proceeds thus:—'Sed quicquid ſit, de ipſa ratione magis, quam de pactis, laborandum eſt. Eâ autem conſultâ, non ſum, qui videam, cur non liceret capere res hoſtiles, quamvis in navi amica repertas, id enim capio, quod hoſtium eſt, quodque jure belli victori cedit. Sin ajas, me non rectè occupare reſt hoſtiles in navi amica, niſi prius occupem navim amicam, atque ita vim faciam rei amici, ut deprehendam rem hoſtis, idque non magis licere quam hoſtes noſtros aggredi in amici portu, vel deprædari in territorio amici, velim animadvertas eatenus utique licitum eſſe amicam navem ſiſtere, ut non ex fallaci forte apluſtri, ſed ex ipſis inſtrumentis, in navi repertis, conſtet, navem amicam eſſe. Si id conſtet, dimittam, ſi hoſtilem eſſe conſtiteret, occupabo. Quod ſi liceat, ut omni jure licet, et perpetuo obſervatur, licebit quoque inſtrumenta, quæ ad merces pertinent, excutere, et inde diſcere, an quæ hoſtium bona in nave lateant, et ſi lateant, quidni ea jure belli occupem.—De eo ſane non dubitant legis maritimæ *in Conſulatu maris*; ſecundum has enim navis amica dimittitur, res hoſtiles in portum victoris productæ publicantur. Sed rurſus rationem non habet, quod ibi additur, opportere victorem magiſtro navis amicæ ſolvere mercedes ſive vecturæ pretia, quia hæc non debentur

Of Vattel.

Vattel, a *French* author of the firſt eminence, maintains, by irrefragable arguments, not only the right of viſitation and ſearch, but alſo that a neutral ſhip which ſhould reſiſt ſuch viſitation and ſearch, may for that cauſe alone, be ſeized and condemned as lawful prize. (*a*)

French ordinances.

Yet the *French* ſeem to have been always governed by their own laws upon this ſubject, without much regard to that which might be deemed the law of nations; and it is curious to obſerve how their regulations have fluctuated, from time to time, under the influence of an intereſted policy.

According to the ancient laws of *France*, a neutral ſhip was always confiſcated which was taken with enemy's goods on board; but with an exception in favour of the *Hans Towns*. (*b*)

By the ordinance of 1543, art. 42, and that of 1584, art. 69, every neutral ſhip, in which ſhould be found any enemy's goods, and all goods found in an enemy's ſhip, though belonging to an ally, were declared good prize. (*c*)

But the rigour of theſe regulations was mitigated by a declaration of *February* 1650, which directs that the goods of the friends and allies of the king, captured by his ſubjects, ſhould be reſtored.

The

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bentur niſi perductis mercibus ad locum deſtinatum. Si cauſeris, per magiſtrum non ſtetiſſe quo minus eo perduxerit, verum dicis; ſed magiſter, ſuo periculo, merces hoſtiles navi ſuæ impoſuit, gnarus, eas capi, et ſic in portum capientis perduci poſſe. Nihil igitur habebit querelarum, ſi ſola navis demittatur, niſi inter eum et victorem convenerit, ut ipſe merces hoſtiles deferat ad locum deſtinatum, tranſlata ſic in victorem cauſa locationis conductionis. Quæſt. jur. pub. lib. 1, c. 14.—(*a*) Vid. *Vattel*, droit des gens, liv. 3, c. 7, art. 113, 114.—(*b*) Vid. *Bynk.* quæſt. jur. pub. lib. 1, c. 14.—(*c*) Vid. *Emerig.* t. 1, p. 450.—*Hubner de la ſaiſie des batim. neut.* part. 1, c. 4, § 7, after animadverting upon the ſeverity of the *Romans*, towards perſons carrying on trade with their enemies, proceeds thus:—'Les ſentimens et la conduite de la *France*, 'ont été, dans les ſiécles précedens, bien plus équitables à ce 'ſujet. Son gouvernement n'a jamais prétendu troubler la na-

'vigation

The famous ordinance of the marine of 1681, (*a*) reſtored the ancient ſeverity, and declared that all ſhips laden with enemies goods, and all goods, either of the king's ſubjects or of his allies, which ſhould be found in enemy's ſhips, ſhould be good prize.

And, by an order of council, dated in *October* 1692, it is commanded, that the above article of the ordinance of 1681, ſhould be executed according to its tenor and form, without any diſtinction, modification or reſtriction, unleſs authorized by the king's particular order.

By a regulation of *July* 1704, it was likewiſe ordered, that, if any enemy's goods ſhould be found in any neutral ſhip, the ſhip and all her cargo ſhould be good prize.

This rigour was again ſoftened by a regulation of *October* 1744, which directs that enemy's goods found on board of neutral ſhips, ſhould be good prize; but that the ſhips themſelves ſhould be releaſed; and we ſhall preſently ſee them carrying this mild principle ſtill farther.

Several northern nations, deſirous of carrying on an unreſtrained commerce with all belligerent powers, and of avoiding the inconvenience of having their veſſels ſtopped and ſearched at ſea, have, in many inſtances, introduced, by their particular treaties, a new principle, namely, that *free ſhips make free goods*: But this was nothing more than controlling, in particular caſes, the general principles of the law of nations, by ſpecial compacts which were binding only upon thoſe who were parties to them. But, as a general rule, *Great Britain* has always denied this new doctrine, Northern confederacy.

'vigation et le commerce ordinaire des états neutres avecſes 'enemis. Ou n'a qu'a voir là deſſus le 42me. chapitre de ſon 'ordonnance de l'année 1543, confirmé par celle de l'année '1584, et l'on trouvera que ces réglemens ſont bien conformes 'aux arrêts du code univerſel des ſocietés ſouveraines ſur cette 'matiére;'—Let this extract ſuffice at once as a ſpecimen of M. *Hubner*'s candour and veracity, and as a proof of the view with which his treatiſe was compoſed.—(*a*) Tit. des priſes, art. 7.

doctrine, and inſiſted on the ancient principle. During the *American* war, in which *Great Britain* ſtood alone againſt *France*, *Spain*, *Holland*, and her own revolted colonies, *Ruſſia*, *Sweden*, *Denmark*, and other inferior ſtates, formed a league mutually to ſupport each other in repelling the right claimed by the *Engliſh*, and in ſupporting what the *French*, ſince their revolution, have called the *modern law of nations*.

The empreſs of *Ruſſia*, who put herſelf at the head of this aſſociation, cauſed a declaration, dated the 28th of *February* 1780, to be delivered to the miniſter of each of the belligerent powers, to this effect :—" That neutral ſhips ought to be at liberty to navigate freely from port to port, and upon the coaſts of the nations at war : That the goods and effects of the ſubjects of the belligerent powers ſhould be free with the exception of contraband goods : That no goods ſhould be conſidered as contraband but ſuch as were ſpecified in the 10th and 11th articles of the treaty of commerce, between *Ruſſia* and *Great Britain*, dated the 20th of *June* 1766 : That to aſcertain what ſhould be deemed a blockaded port, it was determined, that none ſhould be admitted to come within that deſcription, but ſuch only where, by reaſon of the near approach of the ſhips employed in the attack, there was an apparent danger that they would be able to enter it : And finally, that theſe principles ſhould ſerve as a baſis for all proceedings and judgments upon the legality of prizes."

The empreſs ordered her fleets to arm in ſupport of this new doctrine, and *Sweden* and *Denmark* followed her example. Thus was formed what was called the *armed neutrality* of the North. It was a blow aimed at once at the ancient maritime juriſprudence of *Europe*, and the naval ſuperiority of *Great Britain*, which *France*, either foreſeeing or being privy to, anticipated by a declaration dated the 26th of *July* 1778, in which it was ordered,—" That no neutral ſhips ſhould be ſtopped or brought into the ports of *France*, though they ſhould be coming from, or going into, the ports of the enemy, except

except ſuch as ſhould be bringing ſuccours to places blockaded, inveſted, or beſieged: That as to neutral ſhips which ſhould be laden with contraband goods deſtined for the enemy, they might be ſtopped and the goods ſeized and confiſcated; but that the ſhips themſelves, and the reſt of their cargoes ſhould be releaſed, unleſs the contraband goods ſhould amount to three-fourths in value of the cargo; in which caſe the ſhip and the whole cargo ſhould be confiſcated; the king reſerving to himſelf the power of revoking this liberty, if the enemy, within ſix months, ſhould not make a ſimilar conceſſion."

But though *Great Britain* never made any conceſſion of a ſimilar kind, yet the *French* did not revoke theirs, except with reſpect to the *Dutch*, whom they were then endeavouring to force into the war.

The ſucceſs which unfortunately attended this armed neutrality has, in the preſent war, (*a*) given birth to a ſimilar attempt in the ſame quarter. But the vigour and ability by which the views of this new confederacy have been fruſtrated, reflect equal honour on thoſe who, at that time, directed the councils of this kingdom, and on the gallant perſons who executed their orders. Their ſpirited exertions, happily for this country, have not only vindicated the ancient ſyſtem, but have taught thoſe who would ſubvert it, that the attempt can never again be made with impunity, ſo long as ſhe retains her naval ſtrength. Little, indeed, would that ſtrength avail, were ſhe again tamely to yield up this important point.

Should the leaſt doubt remain in any impartial mind as to the admiſſibility of the principle which this country contends for, it muſt vaniſh upon the peruſal of the following judgment delivered in our Court of Admiralty by a learned perſon, whoſe virtues and talents cannot fail to excite the veneration and applauſe of all *Europe*.

Judgment of the court of Admiralty in the caſe of the ſhip *Maria*.

That judgment was delivered in the caſe of the ſhip *Maria*, (*b*) one of ſeveral *Swediſh* veſſels, ſailing under the

(*a*) This was written in *Auguſt* 1801.—(*b*) Dr. Robinſon's reports of admiralty caſes, vol. 1.

the convoy of a *Swediſh* frigate condemned, after ſolemn argument, for reſiſting viſitation and ſearch.—The learned judge, after ſtating and commenting upon the facts of the caſe which it is not neceſſary here to detail, proceeds thus:—"This being the actual ſtate of the facts, it is proper for me to examine to what conſiderations they are juſtly ſubject, according to the law of nations; for which purpoſe I ſhall ſtate a few principles of that ſyſtem of law which I take to be incontrovertible.—1ſt. *That the right of viſiting and ſearching merchant-ſhips upon the high-ſeas, whatever be the ſhips, whatever be the cargoes, whatever be the deſtinations, is an inconteſtable right of the lawfully commiſſioned cruiſers of a belligerent nation.* I ſay, be the ſhips, the cargoes, and the deſtinations what they may; becauſe, till they are viſited and ſearched, it does not appear what the ſhips, or the cargoes, or the deſtinations are; and it is for the purpoſe of aſcertaining theſe points, that this right of viſitation and ſearch exiſts. This right is ſo clear in principle, that no man can deny it who admits the legality of maritime capture; becauſe, if you are not at liberty to aſcertain, by ſufficient inquiry, whether there be property that can legally be captured, it is impoſſible to capture. Even thoſe who contend for the inadmiſſible rule that *free ſhips make free goods*, muſt admit the exerciſe of this right, at leaſt for the purpoſe of aſcertaining whether the ſhips be free ſhips or not. The right is equally clear in practice; for the practice is uniform and univerſal upon the ſubject. The many *European* treaties which refer to this right, refer to it as pre-exiſting, and merely regulate the exerciſe of it. All writers upon the law of nations unanimouſly acknowledge it, without the exception of *Hubner* himſelf, the great champion of neutral privileges. In ſhort, no man in the leaſt degree converſant with ſubjects of this kind has ever, that I know of, breathed a doubt upon it. The right muſt unqueſtionably be exerciſed with as little of perſonal harſhneſs and of vexation in the mode as poſſible; but ſoften it as much as you can, it is ſtill a right of force, though of lawful force,—ſomething in the nature of civil proceſs, where force is employed, but a lawful

The cruiſers of every belligerent ſtate have a right to viſit and ſearch all ſhips on the high ſeas.

lawful force, which cannot be lawfully reſiſted. For it is a wild conceit, that wherever force is uſed, it may be forcibly reſiſted: A lawful force cannot lawfully be reſiſted. The only caſe where it can be ſo, in matters of this nature, is in the ſtate of war and conflict between two countries, where one party has a perfect right to attack by force, and the other has an equally perfect right to repel by force. Bnt in the relative ſituation of two countries at peace with each other, no ſuch conflicting rights can poſſibly coexiſt.—2dly. *That the authority of the ſovereign of the neutral country being interpoſed in any manner of mere force, cannot legally vary the rights of a lawfully commiſſioned belligerent cruiſer:* I ſay *legally*, becauſe what may be given, or be fit to be given, in the adminiſtration of this ſpecies of law, to conſiderations of comity, or of national policy, are views of the matter, which, ſitting in this court, I have no right to entertain. All that I aſſert is, that *legally* it cannot be maintained, that if a *Swediſh* commiſſioned cruiſer, during the wars of his own country, has a right, by the law of nations to viſit and examine neutral ſhips, the king of *England*, being neutral to *Sweden*, is authorized by that law to obſtruct the exerciſe of that right with reſpect to merchant ſhips of his country. I add this, that I cannot but think that if he be obſtructed by force, it would very much reſemble, (with all due reverence be it ſpoken,) an oppoſition of illegal violence to legal right. Two ſovereigns may unqueſtionably agree, if they think fit, as in ſome late inſtances they have agreed, (*a*) by ſpecial covenant, that the preſence of one of their armed ſhips, along with their merchant-ſhips, ſhall be mutually underſtood to imply that nothing is to be found in that convoy of merchant-ſhips, inconſiſtent with amity or neutrality; and if they conſent to accept this pledge, no third party has a right to quarrel with it, any more than with any other pledge which they may agree mutually to accept. But ſurely no ſovereign can legally compel the acceptance

No neutral ſovereign has a right, by means of force, to deprive a cruiſer of this right.

(*a*) It is made an article of the treaty between *America* and *Holland*, an. 1782, art. 10, *Martin*'s treaties, vol. 2, p. 255.

acceptance of ſuch a ſecurity by mere force. The only ſecurity known to the law of nations upon this ſubject, independent of all ſpecial covenant, is the right of perſonal viſitation and ſearch, to be exerciſed by thoſe who have an intereſt in making it. I am not ignorant that, amongſt the looſe doctrines which modern fancy, under the various denominations of philoſophy and philanthropy, and I know not what, have thrown upon the world, it has been within theſe few years advanced, or rather inſinuated, that it might poſſibly be well if ſuch a ſecurity were accepted. Upon ſuch unauthorized ſpeculations, it is not neceſſary for me to deſcant: The law practice of nations, (I include particularly the practice of *Sweden* when it happens to be belligerent,) give them no ſort of countenance; and until the law and practice are new modelled in ſuch a *way* as may ſurrender the known and ancient rights of *ſome* nations to the preſent convenience of *other* nations, (which nations may perhaps *remember to forget* them, when they happen to be themſelves belligerent,) no reverence is due to them; they are the elements of that ſyſtem which, if it be conſiſtent, has for its real purpoſe an entire abolition of capture in war;—that is, in other words, to change the nature of hoſtility, as it has exiſted among mankind, and to introduce a ſtate of things not yet ſeen in the world, that of a military war and a commercial peace. If it were fit that ſuch a ſtate ſhould be introduced, it is at leaſt neceſſary that it ſhould be introduced in an avowed and intelligible manner, and not in a way which, profeſſing gravely to adhere to that ſyſtem which has for centuries prevailed amongſt civilized ſtates, and urging at the ſame time a pretenſion utterly inconſiſtent with all known principles, delivers over the whole matter at once to eternal controverſy and conflict, at the expenſe of the hazard of the harmony of ſtates, and of the lives and ſafeties of innocent individuals.—3dly. *That the penalty for the violent contravention of this right is the confiſcation of the property ſo withheld from viſitation and ſearch.* For the proof of this I need only refer to *Vattel*, one of the moſt correct, and certainly not the leaſt indulgent of modern

The penalty of reſiſtance to ſearch is the confiſcation of the property withheld from ſearch.

modern profeſſors of public law. He expreſſes himſelf thus: (*a*) "*On ne peut empecher le tranſport des effects de contrebande, ſi l'on ne viſite pas les vaiſſeaux neutres que l'on rencontre en mer. On eſt donc en droit de les viſiter. Quelques nations puiſſantes ont refuſé en différens tems de ſe ſoumettre à cette viſite;—aujourd' hui un vaiſſeau neutre, qui refuſeroit de ſouffrir la viſite, ſe feroit condamner par cela ſeul, comme étant de bonne priſe.*" *Vattel* is here to be conſidered, not as a lawyer merely delivering an opinion, but as a witneſs aſſerting the fact,—the fact that ſuch is the exiſting practice of modern *Europe*. And to be ſure the only marvel in the caſe is, that he ſhould mention it as a law merely modern, when it is remembered that it is a principle, not only of the civil law, on which great part of the law of nations is founded, but of the private juriſprudence of moſt countries in *Europe*,—that a contumacious refuſal to ſubmit to fair inquiry infers all the penalties of convicted guilt. Conformably to this principle we find in the celebrated *French* ordinance of 1681, now in force, (*b*) "*That every veſſel ſhall be good prize in caſe of reſiſtance and combat;*" and *Valin*, in his ſmaller commentary, (*c*) ſays expreſsly, that although the expreſſion is in the conjunctive, yet that the *reſiſtance alone is ſufficient*. (*d*) He refers to the *Spaniſh* ordinance of 1718, evidently copied from it, in which it is expreſſed in the disjunctive,—"in caſe of reſiſtance *or* combat." And recent inſtances are at hand and within view, in which it appears that *Spain* continues to act upon this principle. (*e*) The firſt time in which it occurs to my notice, on the inquiries I have been able to make in the inſtitutes of our own country, reſpecting matters of this nature, excepting what occurs in the black book of the admiralty, (*f*) is the order

(*a*) Vid. liv. 3, c. 7, ſect. 114.—(*b*) Art. 12.—(*c*) p. 81.—(*d*) In ſome of the treaties of *France* this article is expreſsly inſerted in the disjunctive. Vid. Tr. between *France* and *Hamburgh*, an. 1769.—(*e*) They acted upon this principle in the caſe of the ſhip *Thetis*, which was the ſubject of the above caſe of *Saloucci* v. *Johnſon*; the caſe, perhaps, to which the learned judge alluded.—(*f*) B. 7 & 8.

der of council of 1664, (*a*) which directs, "That when a ſhip, met withal by the royal navy or other ſhip commiſſionated, ſhall fight or make reſiſtance, the ſaid ſhip and goods ſhall be adjudged lawful prize."—A ſimilar article occurs in the proclamation of 1672. I am aware that in thoſe orders and proclamations are to be found ſome articles not very conſiſtent with the law of nations, as underſtood now, or indeed at that time; for they are expreſsly cenſured by Lord *Clarendon*. (*b*) But the article I refer to is not of thoſe he reprehends; and it is obſervable that Sir *Robert Wiſeman*, then the King's advocate general, who reported upon the articles in 1673, and expreſſes a diſapprobation of ſome of them as harſh and novel, does not mark this article with any obſervation of cenſure. I am therefore warranted in ſaying, that it was the rule, and the undiſputed rule, of the *Britiſh* admiralty. I will not ſay that that rule may not have been broken in upon in ſome inſtances by conſiderations of comity or of policy, by which it may be fit that the adminiſtration of this ſpecies of law ſhould be tempered in the hands of thoſe tribunals which have a right to entertain and apply them; for no man can deny that a ſtate may recede from its extreme rights, and that its ſupreme councils are authorized to determine in what caſes it may be fit to do ſo, the particular captor having in no caſe any other right and title than what the ſtate itſelf would poſſeſs under the ſame facts of capture. But I ſtand with confidence upon all fair principles of reaſon,—upon the diſtinct authority of *Vattel*, upon the inſtitutes of other great maritime countries, as well as thoſe of our own country,—when I venture to lay it down, that by the law of nations, as now underſtood, a deliberate and continued reſiſtance to ſearch, on the part of a neutral veſſel to a lawful cruiſer, is followed by the legal conſequence of confiſcation."

Having

(*a*) Art. 12, vid. *Thurloe's* ſtate papers, vol. 1, p. 424.—(*b*) Lord *Clarendon's* life, p. 242.

Having fully conſidered the caſes of the forfeiture of neutrality by a reſiſtance to viſitation and ſearch, we now proceed,

Secondly, to ſhew, In what caſes a ſhip may forfeit her neutrality, *by ſailing without proper documents*; or by acting *in contravention of particular treaties* made with either of the belligerent powers.

The meaning of the warranty is, that the ſhip or goods inſured ſhall not only be the *property* of neutral perſons, but alſo that they ſhall be neutral, *to the purpoſe of being protected*. The ſhip muſt therefore be navigated according to the law of nations; and ſhe muſt alſo be furniſhed with all the documents and papers which are the evidences of her neutrality, and of her obſervance of the regulations of particular treaties to which ſhe is bound to conform.

The meaning of the warranty is that the ſhip ſhall be neutral *to the purpoſe of being protected.*

It may not be improper here to enumerate the various documents and papers, moſt of which are expected to be found on board of every neutral ſhip. (*a*)

Documents requiſite for neutral ſhips.

1. THE PASSPORT. This is a permiſſion from the neutral ſtate to the captain or maſter of the ſhip to proceed on the voyage propoſed, and uſually contains his name and reſidence, the name, deſcription, and deſtination of the ſhip, with ſuch other matters as the practice of the place requires. This document is indiſpenſably neceſſary for the ſafety of every neutral ſhip. *Hubner* (*b*) ſays that this is the only paper that is rigouroufly inſiſted upon by the *Barbary* corſairs, by the production of which alone their friends are protected from inſult.

Paſſport.

2. THE SEA LETTER, OR SEA BRIEF, which ſpecifies the nature and quantity of the cargo, the place from whence it comes and its deſtination. This paper is not ſo neceſſary as the paſſport, becauſe that in moſt particulars ſupplies its place.

Sea-letter.

3. THE PROOFS OF PROPERTY, which ought to ſhew that the ſhip really belongs to the ſubjects of a neutral ſtate. If ſhe appear to either belligerent to have been built in the enemy's country, proof is generally required that ſhe was purchaſed by the neutral before, or captured

Proofs of property.

(*a*) Vid. *Hubner de la ſaiſ. des bat. neut.* par. 1. ch. 3, § 10—
(*b*) Ubi ſup.

tured and legally condemned ſince, the declaration of war; and in the latter caſe, the *bill of ſale*, properly authenticated, ought to be produced.—Even *Hubner* (*a*) admits that theſe proofs are ſo eſſential to every neutral veſſel, for the prevention of frauds, that thoſe which ſail without them will have no reaſon to complain if they are interrupted in their voyages, and their neutrality even diſputed.

Muſter Roll. 4. THE MUSTER ROLL, which the *French* call *Role d'equipage*, contains the names, ages, quality, place of reſidence, and above all, *the place of birth* of every perſon of the ſhip's company.—This document is of great uſe in aſcertaining a ſhip's neutrality. It muſt naturally excite a violent ſuſpicion if the majority of the crew be found to conſiſt of foreigners, ſtill more if they be natives of the enemy's country.

Charter Party. 5. THE CHARTER PARTY. This inſtrument ſerves to authenticate many of the facts on which the proof of the ſhip's neutrality muſt reſt, and is therefore extremely neceſſary.

Bill of lading. 6. THE BILL OF LADING, by which the captain acknowledges the receipt of the goods ſpecified therein, and promiſes to deliver them to the conſignee or his order. Of this there are uſually ſeveral duplicates; of which, one is delivered to the captain, one kept by the ſhipper of the goods, and one tranſmitted to the conſignee. This inſtrument, being only the evidence of a private tranſaction between the owner of the goods and the captain, does not carry with it the ſame degree of authenticity as the charter-party.

Invoices. 7. THE INVOICES, which contain the particulars and prices of each parcel of goods, with the amount of the freight, duties and other charges thereon, which are uſually tranſmitted from the ſhippers to their factors or conſignees. Theſe invoices prove by whom the goods were ſhipped, and to whom conſigned. They carry with them, however, but little authenticity, being eaſily fabricated where fraud is intended.

8. THE

(*a*) Ubi ſup.

8. THE LOG BOOK, or ſhip's journal, which contains an accurate account of the ſhip's courſe, with a ſhort hiſtory of every occurrence during the voyage. If this be faithfully kept, it will throw great light on the queſtion of neutrality. If it be in any reſpect fabricated, this may in general be eaſily detected. Log-book.

9. THE BILL OF HEALTH, which is a certificate properly authenticated, that the ſhip comes from a place where no contagious diſtemper prevails, and that none of the crew, at the time of her departure, were infected with any ſuch diſtemper. This bill of health is generally found on board of ſhips coming from the *Levant*; or from the coaſt of *Barbary*, where the plague ſo frequently prevails. Bill of health.

Upon the ſubject of the ſhip's documents, it is to be obſerved that, though by the law of nations the want of ſome of theſe papers may be taken as ſtrong *preſumptive evidence*, yet the want of none of them amounts to *concluſive evidence*, againſt a ſhip's neutrality. But the want of any of theſe papers is only preſumptive evidence againſt a ſhip's neutrality.

It has already been ſaid, that a ſhip warranted neutral, muſt be neutral *to the purpoſe of being protected*; ſhe muſt therefore be navigated, not only according to the law of nations, but alſo in conformity to the particular treaties ſubſiſting between the country to which ſhe belongs and the belligerent ſtates. A ſhip warranted neutral muſt therefore, in order to fulfil the warranty, not only belong to the ſubjects of ſome neutral ſtate, but alſo have all the requiſites to entitle her to the privileges and immunities of ſhips belonging to that ſtate. The following caſe will ſhew that the want of any of theſe, *for any part of the voyage inſured*, though it only ſubjects the ſhip to *ſearch and detention*, will diſcharge the inſurer. A ſhip warranted neutral muſt be navigated according to the treaties by which ſhe is bound.

An inſurance was made on the ſhip *Atlantic*, "At and "from *London* to *Guernſey*, from thence to the coaſt of "*Africa*, during her ſtay and trade there, and at and "from thence to her port or ports of diſcharge in all or "any of the *Britiſh Weſt India iſlands* and *America*. The "ſhip and goods on board warranted *American* property." —In an action on this policy to recover a total loſs by capture, it appeared, "That the *Atlantic* was an *American* ſhip, A ſhip inſured from *A.* to *B.* and from thence to *C.* and *D.* warranted *American* property, ſails from *A.* to *B.* without the paſſport required by the treaty between *France* and *America*. At *B.* ſhe pro-

cures ſuch a paſſport, but is afterwards captured by the *French* on her paſſage to *C.*—The inſured cannot recover for this loſs; though at the time of the capture, the proper paſſport was on board, and though the ſhip ought not to have been condemned by the *French* as prize; becauſe ſhe *did not fail* with all requiſites to entitle her to the privileges of an *American* ſhip.

Rich v. *Parker*, 7 T. R. 705, S. C. *Eſp.* Rep. 615.

ſhip, the property of the plaintiff, a native and citizen of the *United States*, and that the goods on board were *American* property. That, by the treaty of 1778, between *France* and the *United States*, it was agreed, 'That 'the ſhips and veſſels belonging to the ſubjects of either 'ally, ſhould be furniſhed with ſea-letters or paſſports, 'in a form preſcribed, expreſſing the name, property, 'and bulk of the ſhip, and the name and place of habi-'tation of the maſter; and that, if the ſhips of the ſub-'jects of either ally ſhould be met with at ſea by the 'ſhips of war of the other, ſuch ſhips of war, for the 'avoiding of any diſorder, ſhould remain out of cannon 'ſhot, and might ſend their boats on board the neutral 'merchant ſhip, to the number of two or three men only, 'to whom the maſter of ſuch ſhip ſhould exhibit his 'paſſport. And that ſuch ſhip, on ſhewing ſuch paſſport, 'ſhould be at liberty to purſue her voyage, ſo as it ſhould 'not be lawful to moleſt, ſearch, or give chaſe to her, 'or force her to quit her intended courſe:'—That when the ſhip ſailed from *London* for *Guernſey*, this country was at war with *France*; but ſhe had not then on board any paſſport, made out according to the form preſcribed by the treaty; but that when ſhe ſailed from *Guernſey*, and until her capture, ſhe had ſuch paſſport on board, which was exhibited to the captain of the privateer at the time of her capture."—The only queſtion was, whether the warranty, *that the ſhip and goods were American property*, had been complied with.—The court were clearly of opinion that it was not complied with; and therefore, that the plaintiff was not entitled to recover.—Lord *Kenyon* ſaid, "On the trial, I gave my opinion ſtrongly in favour of the defendant, and I have no reluctance in ſaying that I continue of the ſame opinion. Nothing can be clearer than this, that if a ſhip inſured be not ſea-worthy, or in a proper condition for ſailing, *during any part of the voyage*, nothing that happens afterwards can better her original ſituation. By the treaty between *France* and *America*, it is agreed that the ſhips and veſſels belonging to the ſubjects of either ally muſt be furniſhed with ſea-letters or paſſports. Now I think the warranty

If a ſhip inſured be not in a proper condition for ſailing, during only a *part of the voyage*, nothing that happens afterwards can better her original ſituation.

warranty in this policy, that the ſhip was *American* property, is not ſatisfied merely by ſhewing that in fact ſhe was *American property*. When theſe parties entered into the contract of inſurance, the underwriter was to be indemnified to a certain extent under this warranty: The ſhip was not only not to be liable to riſks ariſing from her not being *American* property, but ſhe was not to be liable to any inconvenience or impediment in her voyage, from her not being in the condition required by the treaty with *France*. The queſtion here is, whether or not this ſhip was in ſuch a ſituation as to be entitled to all the privileges of an *American* flag: I think ſhe was not. It is true, perhaps, that the *French* had no right to confiſcate the ſhip for not having the paſſport on board, if in fact it were proved that ſhe was an *American* ſhip. But, under the terms of this treaty, the *French* had a right to do certain acts which they could not have done, according to the treaty, if the paſſport had been on board; for then the *French* ſhips were not to come within cannon ſhot, nor to chaſe or drive her out of her courſe; and they were not to ſend more than two or three men on board. This negative implies an affirmative, that in caſe ſhe had no paſſport on board, the *French* would have been guilty of no infraction of the treaty, if they had forced this ſhip out of her courſe. By this contract it is intended that the underwriter ſhould not be liable to ſuch riſks: But the ſhip was in fact ſubject to theſe riſks and inconveniences through the neglect of the inſured, becauſe he did not do all that was required by the treaty. Might not this ſhip have been carried into a *French* port, and the voyage been thereby delayed for want of this paſſport, though, perhaps, ultimately ſhe would not have been liable to confiſcation? And is not that a greater riſk than the underwriter engaged to inſure againſt, in the caſe of a ſhip warranted *American*? It is true that the loſs did not happen in conſequence of the ſhip's not having a paſſport, but ſtill the underwriter was put to greater riſk than he would have been put to, if the ſhip had had this document on board."—Mr. Juſtice *Aſhurſt* ſaid,—"The warranty

The warranty is not ſatisfied by merely ſhewing that the thing inſured in fact belonged to a neutral.

If a ſhip, for want of a neceſſary document, merely ſubject herſelf to be carried into the port of a belligerent, ſhe falſifies the warranty.

A warranty that the ſhip is neutral does not merely mean that ſhe was built in the neutral ſtate, but that ſhe is entitled to all the indemnities of the ſhips of that ſtate.

ranty that the ſhip was *American* does not merely mean that ſhe was *American-built*, but that ſhe was entitled to all the privileges and indemnities of an *American* ſhip, otherwiſe it makes a difference in the value of the riſk; and, to entitle her to theſe privileges, ſhe ought to have had a paſſport; and if the underwriters had been informed that ſhe could not have one on board, in the firſt part of the voyage from *London* to *Guernſey*, perhaps he would not have inſured for the ſame premium. —Mr. Juſtice *Groſe* thought the principle eſtabliſhed in the caſes of *De Hahn* v. *Hartley*, (*a*) and *Barzillay* v. *Lewis* (*b*) muſt decide this.—Mr. Juſtice *Lawrence* ſaid, that the finding of the jury, "that the ſhip was *American* property," did not amount to a finding, that the warranty had been *complied with*. That if the meaning of the warranty was, that the ſhip was entitled to all the privileges of an *American* flag, which he thought the fair conſtruction of the policy, then the warranty was not complied with.

But neutrals are not bound to take notice of regulations made by belligerents contrary to the law of nations.

But in every maritime war, the belligerent powers take upon themſelves to make various marine regulations, adapted to their own reſpective ſituations and intereſts; but often contrary to the law of nations, and inconſiſtent with the independence of other ſtates. And though it may be prudent for the ſubjects of neutral ſtates, which are unable, or unwilling, to contend with ſuch belligerent powers, to conform to theſe regulations, for their own ſafety, yet it ſeems to be now ſettled, that they are not bound by them; and therefore, a condemnation avowedly grounded on the non-obſervance of them, will not amount to proof of the forfeiture of the warranty.

If a ſhip be condemned for forfeiting her neutrality, and upon the face of the ſentence it appear not to be a legal cauſe of forfeiture; this ſentence will not be concluſive.

If, therefore, a ſhip be condemned, by a foreign court of admiralty, for having forfeited her neutrality, and the act for which ſhe has been ſo condemned, appear on the face of the ſentence not to amount to ſuch forfeiture, either by the law of nations, or particular treaties, the ſentence will not be concluſive to falſify the warranty. This was determined in the following caſe.

A ſhip

(*a*) Sup. 250.—(*b*) Inf. 323.

A ſhip was *warranted Portugueze;* and, being taken by a *French* privateer, was condemned, *becauſe ſhe had an Engliſh ſupercargo on board.*—In an action on the policy, it appeared that the *French* government had lately made an ordinance, declaring all ſhips liable to capture, where the ſupercargo was the ſubject of a ſtate at war with *France.*—The plaintiff obtained a verdict, and upon a motion for a new trial, the court determined that the warranty was not falſified by this condemnation, and that the plaintiff was entitled to recover.—Lord *Mansfield* ſaid; —"This is an arbitrary and oppreſſive regulation, contrary to the law of nations. But as neither the inſured nor the underwriters knew any thing of it, neither of them was guilty of any fault. If the inſured had known of it, he might have taken care to conform to it: If the underwriters had known of it, they ought to have inquired who was to be ſupercargo. Both, however, being innocent, the underwriters, who take the riſk upon themſelves, ought to be liable for the loſs. It muſt be a fraudulent concealment to vitiate a policy. It is remarkable that neither party has ſaid any thing of the treaties between *France* and *Portugal.*"

A ſhip warranted *Portugueze*, is condemned by the *French* becauſe ſhe had an *Engliſh* ſupercargo on board, contrary to a *French* ordinance: This ordinance being contrary to the law of nations, the ſentence does not falſify the warranty.

Mayne v. *Walter*, B. R. Eaſt. 22 *G.* III. MS. S. C. *Park* 362.

This laſt obſervation ſhews that if the having an *Engliſh* ſupercargo on board had been contrary to any ſubſiſting treaty between *France* and *Portugal*, the condemnation would have been juſt, and the ſentence concluſive, to ſhew a forfeiture of the ſhip's neutrality. The following deciſion will ſerve to confirm this doctrine.

But if a ſhip be not navigated according to the ſubſiſting treaties between the country to which ſhe belongs, and the belligerent ſtate, ſhe will forfeit her neutrality.

A ſhip was inſured from *Liverpool* to *Amſterdam*, '*warranted Dutch property*,' and was captured by the *French*, carried into *St. Maloes*, and there releaſed as being *Dutch* property; but upon appeal to the council of ſtate at *Paris*, ſhe was condemned as prize, by the name of *The Three Graces of Liverpool.*—In an action on the policy, it appeared that the ſhip had been originally a *French* privateer, called *L'Aimable Agathée*, which was taken by an *Engliſh* privateer and carried into *Liverpool*; and being condemned, ſhe there got the new name of *The Three Graces.*

A ſhip warranted *Dutch*, is condemned becauſe ſhe had not the neceſſary documents to prove her to be ſuch, according to the treaty of *Utrecht*, to which the *Dutch* were parties.—This

falſifies the warranty.

Graces. A merchant at *Liverpool* bought her for a houſe at *Amſterdam*, from whence a *Dutch* paſs or ſea brief was ſent for her, tranſlating her new name into *Dutch*, according to the treaty of *Utrecht*. She ſailed from *Liverpool*, under a *Dane*, who was her captain and a crew conſiſting of 16, of whom five were *French*, who had been priſoners of war, and were returning home, four *Danes*, two *Swedes*, one *Dutch*, one *Portuguese*, one *Hamburgher*, one *Norwegian*, and one *Iriſh*. It appeared in evidence that by a *French* ordinance it was provided, 'That ſhips originally belonging to the enemy, and purchaſed by neutrals, are not conſidered as domiciled till they have been within ſome port of the neutral nation; and that a paſs ſhould be deemed fraudulent, unleſs the ſhip had been in the port from whence it had been obtained.' And, by another ordinance, two-thirds of the crew were required to be ſubjects of the neutral ſtate. Some of the crew ſwore they were hired by *Engliſhmen*, and that both ſhip and cargo were *Engliſh*; that when the ſhip, which took them, came in ſight, the captain ſailed back towards the *Engliſh* coaſt: But one of the crew having informed him that the ſhip in ſight carried *Engliſh* colours, he reſumed his courſe. The plaintiff was nonſuited on the ground that the decree of the court of appeal was deciſive to prove that the warranty was falſe.—Upon a motion for a new trial, the court concurred in that opinion, and that the policy was void.—Lord *Mansfield* ſaid,—"The warranty meant that the ſhip was *Dutch*, *to the purpoſe of being protected*; and the ſentence of the court of appeal in *France* is concluſive. The queſtion then is, what the ſentence means. The ſhip is condemned as not being *Dutch*. The warranty was, that ſhe was *Dutch*, which was falſe. The law of nations is founded in eternal principles of juſtice.—But in every war, the belligerent powers make particular regulations for themſelves, which being no part of, or, perhaps, repugnant to, the law of nations, do not bind other ſtates: But other ſtates, though not bound by them, muſt take notice of them for their own ſafety.

Barrilley v. *Lewis*, B. R. Trin. 22 G. III. MS. S. C. *Park* 258.

Neutrals ought, for their own ſafety, to take notice of the regulations made by the belligerent powers, even tho' repugnant to the law of nations.

In

In this caſe the inſured warranted this ſhip to be *Dutch*, and they knew they muſt conform to the marine regulations of *France*. The inſurers took the riſk upon this warranty; but when it is ſifted in the *French* courts, it turns out that ſhe has not the requiſites of a *Dutch* ſhip, her paſs not being agreeable to the treaty of *Utrecht*; and it ſhould appear to have been made on the oath of the captain. If the ſentence had gone on a ground collateral to the property, the plaintiff would have been permitted to go into evidence to ſhew the truth of the warranty; and ſo it was holden in *Mayne* v. *Walter*: (*a*) But this condemnation went on the ground that ſhe was not completely documented, as a *Dutch* ſhip.

The two laſt caſes reconciled, and the reſult of both ſtated.

The doctrines contained in the two foregoing caſes ſeem, at firſt ſight, to be rather at variance: But a little attention will ſhew that there is a material difference between the circumſtances of the one and of the other. In the latter, ſuppoſing the ſhip to have been *Dutch* property, the owner, if not bound to know the regulations made in *France* on the ſubject of *Dutch* ſhips, ought at leaſt to have known what documents every *Dutch* ſhip was bound to have by the treaty of *Utrecht*, to which the ſtates of *Holland* were parties. And it muſt be taken as a rule, that the party warranting muſt be completely documented. Lord *Mansfield*, it is true, ſays that though other ſtates are not bound by the particular regulations made by belligerent powers, againſt the law of nations, yet *they muſt take notice of them*, for their own ſafety; and from this expreſſion it might be reaſonably inferred that he was of opinion that the non-obſervance of theſe regulations would amount to a forfeiture of neutrality. But he expreſsly ſays, that the ground of the condemnation in that caſe was, that the ſhip was not completely documented as a *Dutch* ſhip, according to the treaty of *Utrecht*. In the former caſe, there was no defect of documents: The only ground of the condemnation was the non-compliance with a *French* regulation, then lately made againſt

(*a*) Sup. 323.

againſt the common rights of all nations. To this regulation the *Portugueze* were no parties; and the inſured were not more likely to be informed of it than the underwriters.—The reſult, however, of Lord *Mansfield's* opinions delivered in both caſes, ſeems to be, that when a belligerent makes particular marine regulations for its own benefit, affecting neutral ſtates, but repugnant to the law of nations; there, though thoſe neutral ſtates are not obliged to obſerve them; yet, as it muſt be ſuppoſed that the power which made them, is determined, at all hazards, to enforce them, it is the duty of an inſured, who warrants his ſhip or goods to be neutral property, if he has any knowledge of ſuch regulations, to conform to them; in order to make himſelf a neutral '*to the* '*purpoſe of being protected;*' or at leaſt diſcloſe to the underwriters his non-conformity.—And if the inſurer, on the other hand, has any knowledge of theſe regulations, he ought to warn the inſured of his danger, and inform himſelf whether the inſured means to conform to them. But if neither has any knowledge of them, a condemnation of a foreign court of admiralty, founded on the breach of them, will not prove a forfeiture of the warranty.

If the inſurer knows of ſuch regulations, he ſhould appriſe the inſured of his danger.

But if both are ignorant of them, a foreign ſentence of condemnation for not conforming to them, will not be concluſive to prove a forfeiture.

Some time after theſe deciſions, a caſe (*a*) came before a very eminent and learned judge, at *niſi prius*, in which he ruled that a ſentence of condemnation, by a foreign court of admiralty, was concluſive againſt the warranty, though founded on the mere want of a document required by an ordinance which was not binding upon any neutral ſtate. But this deciſion has been ſince overruled, and the noble and learned judge has himſelf declared his diſapprobation of it. (*b*) As it cannot, therefore, be now conſidered as any authority, it is unneceſſary to take any farther notice of it in this place.

In the following caſe, which has been lately decided upon great conſideration, and upon a review of all the former authorities on this point, the line has been ably and accurately drawn between thoſe ſentences of

(*a*) *De Souza* v. *Ewer*, *Park* 360.—(*b*) Vid. 8 T. R. 444, n.

of foreign courts of admiralty, which muſt be taken to be concluſive againſt the warranty, and thoſe which are not concluſive, but leave the queſtion of neutrality open for diſcuſſion in our courts.

A ſhip warranted *Daniſh* is captured by the *French*, and condemned as prize, becauſe the captain was an 'enemy.'—This ſentence not being founded on the ground that the ſhip was not a *Daniſh* ſhip, but only becauſe ſhe had been navigated contrary to a *French* ordinance, does not falſify the warranty.

Pollard v. *Bell*, 8 T.R. 343.

An inſurance was made on goods on board the ſhip *Juliana*, "warranted a *Dane*," at and from *London* to *Teneriffe*.—In an action on this policy to recover for a loſs by capture, it appeared that the *Juliana was a* Daniſh *ſhip; the property of* Daniſh *ſubjects;* that ſhe ſailed from *Copenhagen* to *London* with a partial cargo, and there took on board a quantity of goods on account of the owners of the ſhip, and alſo the goods on which the inſurance was made; and, having taken out clearances for *Guernſey* and *Madeira*, ſhe ſailed on the voyage inſured, was captured by a *French* privateer, and carried into *Bourdeaux*: That during the voyage, and at the time of the capture, the *Juliana* had on board every document uſually carried by *Daniſh* ſhips: That *Eggleſton*, the maſter, was a native of *Scotland*, not naturalized in *Denmark*; but on the 6th of *October* 1794, poſterior to the war between *England* and *France*, he obtained letters of burgherſhip in *Denmark*, but had no domicil there: That the ſhip and cargo were condemned as prize by the tribunal of commerce of *Bourdeaux*; and this ſentence was confirmed upon appeal to the civil tribunal of *La Gironde*. In theſe two ſentences were recited ſeveral *French* ordinances, particularly one in 1778, by which it is declared that all ſhips ſhall be confiſcated, wherever there ſhall be found on board a ſupercargo, merchant, commiſſary, or *chief officer*, being an enemy;" and it appeared that the ſhip was ultimately condemned for a violation of that ordinance, the captain being a *Scotchman*. Upon appeal to the ſupreme tribunal of caſſation at *Paris*, the former ſentences were confirmed, upon the ground that the maſter was born in *Scotland*, and an enemy; and that, as his denization in a neutral country was not juſtified according to law, *his quality of enemy ſufficed to legitimate the prize*; and the court condemned him to pay a fine of 150 franks.—Upon this caſe, it was objected on the part of the defendant, that the ſhip was proved, by the ſentences

sentences of the *French* courts, not to be *Daniſh*, as ſhe was warranted to be.—But the court were unanimouſly of opinion that the warranty was not falſified by theſe ſentences, and that the plaintiffs were entitled to recover. —Lord *Kenyon* ſaid;—"It is true that the meaning of the warranty was not merely that the ſhip was *Daniſh* built, but that ſhe ſhould be circumſtanced during the voyage as a *Daniſh* ſhip ought to be. This is one of the numberleſs queſtions that have ariſen in conſequence of the extraordinary ſentences of condemnation paſſed by the courts of admiralty in *France* during this war, which have all proceeded on a ſyſtem of plunder. But ſtill, until the legiſlature interferes on this ſubject, we, ſitting in a court of law, are bound to give credit to the ſentences of courts of competent juriſdiction. If, therefore, in this inſtance, the *French* courts had condemned this ſhip, on the ground that ſhe was *Daniſh* property, we ſhould have been concluded by that ſentence in this action, and muſt, however reluctantly, have given judgment for the defendant. This is proved by the different authorities, and ſupported by reaſon. The courts of admiralty profeſs to proceed on the law of nations, and ſuch treaties as particular ſtates have agreed ſhall be ingrafted on that law. But I concur with Lord *Mansfield* in opinion, that it is not competent to any individual ſtate to add to the law of nations by its own arbitrary ordinances, without the concurrence of other ſtates. (*a*) That is the ground on which this caſe muſt be decided. Now let us ſee what was the foundation of the condemnation in the *French* courts? It is ſtated in one of the ſentences, that by their own ordinances all ſhips are to be confiſcated "whenſoever on board theſe ſhips ſhall be found a ſupercargo, merchant, commiſſary, or chief officer, being an enemy." But I ſay that they had no right, by making ſuch an ordinance, to bind other nations. Then, was the ſhip in queſtion condemned on the ground that ſhe was not *Daniſh* property? Certainly not. It appears clear beyond all doubt that ſhe was at leaſt condemned on the ground

Though the ſentence of a foreign court of admiralty be founded on a ſyſtem of plunder, and manifeſt injuſtice, yet our courts of law are bound to give credit to their ſentences.

No individual ſtate can add to the law of nations by its own ordinances.

(*a*) Vid. *Bird* v. *Appleton*, 8 T. R. 562.

ground that the captain was one of thoſe perſons whom by their own ordinances only they wiſhed to proſcribe. This caſe cannot be diſtinguiſhed from that of *Mayne* v. *Walter*; *(a)* though, even without the authority of that caſe, I ſhould have had no heſitation in deciding in favour of the plaintiff. On the whole, therefore, I am of opinion, that though we ſhould have been concluded by that ſentence, if the ſhip, contrary to juſtice, had been condemned as not being *Daniſh*; yet, as the courts abroad have endeavoured to give other ſupports to their judgment, which do not warrant it, and have ſtated, as the foundation of the ſentence of condemnation, one of their own ordinances which is not binding on other nations, this ſentence does not prove that the ſhip in queſtion was not a neutral ſhip; and conſequently the plaintiff is entitled to recover.—Mr. Juſtice *Lawrence* ſaid,—"There are two queſtions in this caſe; *firſt*, what is the ground of the ſentence of condemnation; *ſecondly*, whether it falſifies the warranty; for if it does, then, according to all the authorities, it is concluſive here.—On the firſt queſtion, the only ground of the ſentence was, that the captain of the ſhip was born in *Scotland* and an enemy; for they ſay, "that his quality of enemy ſufficed to legitimate the prize;" and this merely becauſe it is againſt one of their own ordinances.—The next queſtion is, whether this has negatived the warranty. This warranty did not induce any neceſſity to comply with the peculiar regulations of the belligerent powers. For the general rule for judging and deciding whether a captured ſhip be neutral or not, is the law of nations, ſubject to ſuch alterations and modifications as may have been introduced by treaties: But where the law of nations has not been varied or departed from by mutual agreement, that is the general rule for deciding all queſtions on matters of prize. This is clearly laid down in the ſtate paper ſigned by Sir *George Lee*, Dr. *Paul*, the King's advocate, Sir *D. Ryder*, and Mr. *Murray*, then Attorney and Solicitor General, in

The law of nations, ſubject to the alterations made by treaties, is the rule for deciding all queſtions of prize.

(*a*) Sup. 323.

Ships ſhould be furniſhed with ſuch documents as the ſtates they belong to have by treaty agreed to be the evidence of their neutrality.

in anſwer to the *Pruſſian* memorials concerning neutral ſhips. (*a*) When, therefore, a ſtate in amity with a belligerent power has, *by treaty*, agreed that the ſhips of their ſubjects ſhall only have that character when furniſhed with certain preciſe documents, whoever warrants the ſhip to be the property of ſuch ſubject, ſhould provide himſelf with thoſe evidences which have, by the country to which ſhe belongs, been agreed to be the neceſſary proof of that character. In requiring this, no difficulty is impoſed, of which the inſured is not aware, and which may not be in his power to prevent: But to inſiſt on his furniſhing himſelf with every document the belligerent powers may require, and to inſiſt that the warranty is not complied with, unleſs the ſhip be navigated according to their ordinances and regulations, would be to deprive the inſured of his indemnity for the want of papers, &c. of the neceſſity of which he may fairly be preſumed ignorant, and which papers it may not perhaps be in his power to procure; for how can the officers of one country be called upon to grant that which the laws of that country do not require? Theſe *French* decrees are regulations made with ſome view to the laws of *France*, but are not applicable to the ſubjects of any other country. In examining the caſes decided on this point, it will be found to have been ſettled in many of them, that a condemnation on the particular ordinances of a belligerent power does not falſify a warranty of neutrality. In the caſe of *Bernardi* v. *Motteux*, (*b*) the ſhip *Joanna* was warranted neutral; the only doubt was, whether ſhe had been condemned as being the property of an enemy, or for violating a *French arrêt*, by throwing papers overboard; for the one or the other of theſe cauſes ſhe was condemned. If ſhe had been condemned for the firſt, namely, that ſhe was not neutral, the plaintiff clearly could not have recovered, nor could he have recovered if ſhe had been condemned on the other ground, according

But they are not bound to furniſh themſelves with every document the belligerent powers may arbitrarily require.

A condemnation on the particular ordinances of a belligerent power, does not falſify the warranty. *Bernardi* v *Motteux*, conſidered.

(*a*) Vid. Collectanea Juridica, 1 vol. 33.—(*b*) *Doug.* 375, ſup. 294.

according to the argument of the defendant in this caſe: But it is clear that the court did not, in that caſe, proceed upon the argument uſed for the defendant in the preſent caſe, becauſe the plaintiff did recover in that caſe, it not being certain that the ground of condemnation was, that the ſhip was the property of an enemy. But the caſe chiefly relied on by the defendant here is that of *Barzillay* v. *Lewis*, (*a*) which was decided on the ground of a non-compliance with the treaty of *Utrecht*, and on the ſentence having condemned the ſhip as *Engliſh*. According to a manuſcript note of that caſe, taken by Mr. Juſtice *Buller*, rather more full than that in print, Lord *Mansfield* began his judgment by ſtating the ſentence of the court of admiralty as being concluſive, and that the queſtion was on the meaning of it. He afterwards obſerved, that the ſhip was inſured by her *Dutch* name, and that the underwriters took it for granted that ſhe was *Dutch*; but that, when this was ſifted in *France*, ſhe appeared to have none of the requiſites to ſhew that ſhe was neutral property, for ſhe had never been in a *Dutch* port, and the ſea brief was *not conformable to the treaty of Utrecht*; and he concluded by ſaying that the ſhip was condemned *as an Engliſh ſhip*, and that it was not open to this court to inquire whether that ſentence were right or wrong. So here if the ſhip had been condemned as an *Engliſh*, and not a *Daniſh* ſhip, we ſhould have been concluded by it. In that caſe Mr. Juſtice *Willes* and Mr. Juſtice *Aſhurſt* concurred; and Mr. Juſtice *Buller* ſaid, "The firſt ſentence ſeems to be on particular *arrêts*. The ſecond appears to go on the ground of property, for the name is changed, and they do not go into evidence as to the muſter-roll or ſituation of the crew as to their being more than two-thirds *Engliſh*. The other ground is more general, and makes it immaterial whether it was on the one ground or the other; *for if ſhe were not ſo documented* as to have the protection of a neutral ſhip, the warranty is not complied with.

Barzillay v. *Lewis* conſidered and illuſtrated.

It

(*a*) *Park* 410. ſup. 323.

It is true that Lord *Mansfield*, in the courſe of giving his opinion in that caſe, uſed ſome expreſſions which may be applied to ſupport the defendant's argument here; but it is clear that the ground on which he decided was a non-compliance with what was agreed by the treaty of *Utrecht* ſhould be a neceſſary document to prove the ſhip to be *Dutch* property; and this was the expreſs ground of the opinions of the other judges. That Lord *Mansfield* could not, in that caſe, intend to ſay that a non-compliance with the ordinances of *France*, not adopted by any treaty, was a forfeiture of neutrality, appears from the caſe of *Mayne* v. *Walter*, where the plaintiff recovered.—He there pointedly ſhewed how ſuch ordinances might become binding, by obſerving that the *whole caſe turned upon the treaties between France and Portugal*, about which both parties were ſilent; and there it was holden that the circumſtance of having an *Engliſh* ſupercargo on board was no ground to defeat the plaintiff's right to recover on a policy on a ſhip warranted to be *Portugueze*. In a ſubſequent caſe, *Saloucci* v. *Johnſon*, (*a*) there were two grounds of condemnation, one that the ſhip would not ſtop to be ſearched, the other, that ſhe had not a charter-party on board, as required by an ordinance of *Spain*. On the latter, Mr. J. *Aſhurſt* ſaid, (according to my own note,)—'As to the next queſtion, her not 'having a charter-party: This clearly is not required by 'the law of nations; and it appears by the caſe that ſhe 'was a general ſhip. And though ſhe acted contrary 'to a particular ordinance of *Spain*, *other nations are not 'bound to take notice of ſuch ordinance, unleſs in virtue of 'ſome treaty ſubſiſting between two ſtates, by which they ſub-'mit to be bound by it.* That is not the caſe here.' So that the doctrine on which the caſe before us is determined was diſtinctly recognized there. The argument of the defendant here is, that the ſentence of condemnation is concluſive, on the point that the ſhip was not navigated according to the contract between the parties.

—The

Mayne v. *Walter* conſidered.

Saloucci v. *Johnſon* conſidered.

(*a*) *Park* 415. ſup. 301.

—The contract between the parties is, that ſhe was a neutral ſhip; but the ſentence has not decided that point; it has only decided that ſhe was not navigated according to an ordinance of *France*, but that was no part of the plaintiff's contract. In deciding this caſe in favour of the plaintiff, we do not take upon ourſelves to ſay that the ſentence of the *French* court of admiralty is erroneous: All that we determine is, that the *French* court has not decided that which would falſify the warranty of neutrality."

Courts of admiralty are to proceed on the *jus gentium*, which is not varied by particular treaties, except as between the parties to ſuch treaties.

In the caſe of *Bird* v. *Appleton*, which came before the court of King's Bench, ſoon after the above caſe, and which has been already fully ſtated, (*a*) Lord *Kenyon* declared that he adhered to the opinion delivered by the court in the above caſe of *Pollard* v. *Bell*; and maintained as an indiſputable propoſition, that courts of admiralty are to proceed on the known *jus gentium*, or on the treaties between particular ſtates; that ſuch treaties do not alter the *jus gentium* with reſpect to the reſt of the world; but as between thoſe particular ſtates they are conſidered as ingrafted on the *jus gentium*; and that one ſtate has no authority, by any ordinance of its own, to vary the general law of nations, as to other ſtates.

(*a*) Sup. 59, 173.

CHAP.

CHAP. IX.

Of Repreſentations.

The neceſſity of a ſtrict obſervance of good faith in matters of inſurance.

GOOD faith ſhould preſide in all the tranſactions of commerce, and in none more than in thoſe of inſurance, of which it is the vital principle. In this contract, each party is bound to conduct himſelf towards the other, not only with integrity, but with the moſt unreſerved openneſs and candour; and they ought mutually to diſcloſe to each other every circumſtance which can in any degree affect the riſk. It ſeldom happens that any ſuch circumſtance lies within the knowledge of the underwriter; fraud is therefore ſeldom imputable to him, and he is much oftener the victim of his own credulity. But the law watches, with a jealous eye, the conduct of the inſured, from whom the underwriter muſt, in moſt caſes, learn all the facts and circumſtances from which he makes his calculations, and appreciates the riſk. Every material repreſentation is conſidered as forming an ingredient in the contract, and every material miſrepreſentation or concealment is therefore deemed a fraud, and will avoid it. We will examine each of theſe important ſubjects in a ſeparate chapter, beginning with rerpeſentations. Under this head we will conſider,

1. What ſhall amount to a material repreſentation;
2. When a repreſentation ſhall be deemed ſufficiently true.

Sect. 1.

What ſhall amount to a material Repreſentation.

A REPRESENTATION, in inſurance, is underſtood to mean a collateral ſtatement, either by parol or in writing, of ſuch facts or circumſtances relative to the propoſed adventure, and not inſerted in the policy, as are neceſſary for the information of the inſurer, to enable him to form a juſt eſtimate of the riſk. Such repreſentations are often the principal inducement to the contract, and afford the beſt ground upon which the premium can be calculated.

Repreſentation in inſurance defined.

A repreſentation may be untrue, either wilfully and fraudulently; or, inadvertently and innocently.

A wilful miſrepreſentation or, *aligatio falſi*, in any fact or circumſtance *material to the riſk*, is a fraud that will always avoid the contract.—As if an agent, knowing that a ſhip had ſailed from *Jamaica* for *London* on the 24th of *November*, effect an inſurance on the voyage, and tell the underwriter that the ſhip ſailed in *December*: This is a fraud, and the policy is void. (*a*)

A miſrepreſentation in a material point avoids the contract.

And ſuch miſrepreſentation ſo completely vitiates the policy, that the inſured cannot recover upon it, even for a loſs ariſing from a cauſe unconnected with the fact or circumſtance miſrepreſented. As if the inſured repreſent that the ſhip or goods inſured are neutral property, when in fact they are enemy's property; he ſhall not recover even for a loſs occaſioned by ſhipwreck.

And the inſured cannot recover on the policy even for a loſs ariſing from a cauſe unconnected with the fact miſrepreſented.

So it would be if the broker or agent were to aſſert that a ſhip or goods were neutral property, without knowing whether this were true or falſe, and they are, in fact, enemy's property: For, though it may not, perhaps, be equally criminal *in foro conſcientiæ* for a man to aver that to be true which he knows nothing of, as to aver

So, if it be made without knowing whether it be true or falſe; or even if the perſon making it believe it to be true.

(*a*) Per *Lee*, C. J. at N. P. in *Roberts* v. *Fonnereau*, *Park*, 176.

ever that to be true which he knows to be falſe; ſtill it is unqueſtionably a fraud, and in the caſe of an inſurance, equally injurious to the underwriter; becauſe he is induced by the deception, however occaſioned, to compute the riſk upon falſe principles. The ſame reaſoning holds even in the caſe where the perſon himſelf making the repreſentation *believes* it to be true.

But if he only give it as his *belief*, without knowing the contrary, it will not affect the contract.

But if he were only to ſay that he *believes* the ſhip to be neutral property, knowing nothing on the ſubject, and having no reaſon to believe the contrary; there, though the ſhip be not neutral, the repreſentation will not avoid the policy; becauſe the underwriter may inform himſelf of the grounds of this belief, before he enters into the contract; and if he neglect to do ſo, he takes upon himſelf the riſk of its being unfounded. (*a*)

Neither does the word *expected* amount to a repreſentation.

Barber v. *Fletcher*, *Doug.* 292.

For the ſame reaſon, if the word *expected* be uſed, this will not amount to a repreſentation: As when a broker, in getting inſurances effected on ſeveral ſhips, belonging to the ſame owner, and ſpeaking of them all, ſaid,—'Which veſſels are *expected* to leave the coaſt of '*Africa* in *November* or *December*,' when, in fact, they had all ſailed in the *May* preceding: This does not amount to a repreſentation, being only an *expectation*, the ground of which the underwriter might have inquired into.

Difference between a repreſentation and a warranty.

There is a material difference between a repreſentation and a warranty. A warranty, being a condition upon which

(*a*) This, in ſubſtance, is the doctrine of Lord *Mansfield* in the caſe of *Pawſon* v. *Watſon*, *Cowp.* 787; and though I would not preſume to queſtion ſo great and diſtinguiſhed an authority, yet I think it cannot be denied that there is, in this ſort of declaration of belief, where the party knows nothing on the ſubject, a want of fairneſs which approaches very near to fraud, and of which one would hope to ſee very few inſtances in commercial tranſactions. No honeſt man would declare even his *belief* of a fact, when this declaration may have the effect of benefiting himſelf at the expenſe of others, without reaſons for ſuch belief, amounting almoſt to moral certainty.

which the contract is to take effect, is always a part of the written policy, and muſt appear on the face of it: (*a*) Whereas a repreſentation is only matter of collateral information or intelligence on the ſubject of the voyage inſured, and makes no part of the policy.—A warranty, being in nature of a condition precedent, muſt be *ſtrictly and literally* complied with; but it is ſufficient if a repreſentation be true in *ſubſtance*.—By a warranty, whether material to the riſk or not, the inſured ſtakes his claim of indemnity upon the preciſe truth of it, if it be affirmative, or upon the exact performance of it, if executory; but it is ſufficient, if a repreſentation be made without fraud, and be not falſe in any material point; or if it be *ſubſtantially*, though not *literally*, fulfilled. A falſe warranty avoids the policy, as being a breach of a condition upon which the contract is to take effect, and the inſurer is not liable for any loſs though it do not happen in conſequence of the breach of the warranty. A falſe repreſentation is no breach of the contract, but if material, avoids the policy on the ground of *fraud*, or at leaſt becauſe the inſurer has been miſled by it.

Written inſtructions, unleſs inſerted in the policy, are only repreſentations.

It has already been ſhewn that a warranty muſt appear upon the face of the policy, and make a part of the written contract; and therefore a written paper, wrapped up in the policy, or even wafered to it, is only a repreſentation. (*b*) For the ſame reaſon, the written inſtructions for effecting the policy, unleſs inſerted in it, cannot be deemed a warranty, but only a repreſentation; (*c*) for the underwriter, by not inſiſting on having theſe inſtructions inſerted in the policy, ſhews that he is content to take them as a repreſentation.

Agents and brokers ſhould keep entries of all ſuch inſtructions, and of every repreſentation.

But it behoves all agents and brokers concerned in the effecting of policies, to keep correct entries of theſe inſtructions, and indeed of all repreſentations made to the underwriters: For the whole queſtion between the inſured

(*a*) Vid. ſup. 251.—(*b*) Sup. 252.—(*c*) *R. Pawſon* v. *Watſon, Cowp.* 785, inf. 341.

ſured and the underwriters often turns upon theſe inſtructions. Beſides, they are anſwerable to the inſured for the conſequences of any repreſentation made by them without authority, (*a*) as well as for thoſe of omitting to make ſuch repreſentations as they have been inſtructed to make.

They are reſponſible for the conſequences of any repreſentation made without authority.

A miſrepreſentation made to the firſt underwriter is a miſrepreſentation to all.

By an extenſion of equitable relief in caſes of fraud, it ſeems to be now ſettled that if a falſe repreſentation be made to the firſt underwriter on the policy, in a material point, this ſhall be conſidered as a miſrepreſentation made to every underwriter, ſo as to infect the whole policy, otherwiſe it might be a contrivance to deceive many; for when a reſpectable underwriter ſtands firſt on the policy, the reſt ſubſcribe the policy without aſking a queſtion; and if the firſt underwriter be impoſed upon, the reſt are entrapped by the ſame fraud. (*b*)

But this objection muſt be made at the trial, in the firſt inſtance: It will be too late afterwards.

But the inſurer muſt avail himſelf of this ſort of objection in the firſt inſtance; for after a verdict has been obtained, the court will not ſet it aſide upon an affidavit of the firſt underwriter, that a material miſrepreſentation had been made to him. The defendant, in ſuch caſe, knows what has been repreſented to himſelf, and might have known what had been repreſented to the firſt underwriter; and he ſhall not lie by till after a trial, in order to make the objection, if the verdict ſhould be againſt him. (*c*)

If the inſured ſtate his computation as *fact*, and it prove untrue, it will avoid the policy.

If the inſured ſtate his computation as *fact*, inſtead of the information on which he founds his computation, and if prove untrue, it is a miſrepreſentation; and if material, it will avoid the policy.

A ſhip inſured on the 30th of *January*, from *New York* to *Philadelphia*, is repreſented to have been ſafe in the *Delaware* on the 11th of *December*, when

As where an inſurance was made in *London*, on the 30th of *January*, on a ſhip from *New York* to *Philadelphia*; and the broker then repreſented the ſhip to be, "A tight veſſel, had ſailed with ſeveral armed ſhips, and "was ſeen ſafe in the *Delaware*, *on the 11th of December*, "by a ſhip which arrived at *New York*."—In fact, the ſhip was

(*a*) Per Lord *Mansfield*, in *Pawſon* v. *Watſon*, *Cowp.* 787.—(*b*) Per Lord *Mansfield*, in *Pawſon* v. *Watſon*, *Cowp.* 786. Vid. ſup. 39.—(*c*) *R. Barker* v. *Fletcher*, *Doug.* 292.

was loſt on the 9th of *December*, by running againſt a *cheveaux de friſe* placed acroſs that river. There was no evidence nor any imputation of actual fraud, on the one hand, nor any proof *when* the ſhip was ſeen in the *Delaware*, on the other.—Upon the trial of the cauſe, there was a verdict for the defendant.—The plaintiff moved for a new trial, inſiſting, that the meaning of the repreſentation was, that the ſhip had got through two thirds of her voyage from *New York*, and beyond the reach of capture. To this it was anſwered, that the queſtion of the materiality of the fact miſrepreſented was before the jury, who had determined that it was material.—The court held that the repreſentation concerning the day being thus found to be material, and being alſo found untrue, the inſured was not entitled to recover. Lord *Mansfield* ſaid;—"A repreſentation muſt be fair and true, as to all that the inſured knows: And if he repreſent facts without knowing the truth, he takes the riſk upon himſelf. This caſe is very different from *Pawſon* v. *Watſon*, (*a*) where the ſhip was only fitting out when the inſurance was made. It was then only ſaid what was *meant* to be done; and what *was done* was more advantageous than what had been repreſented. Though there was no evidence of actual fraud in this caſe; yet the underwriter was deceived as to the fact, and entered into the contract under that deception. The inſured ought not to have taken upon himſelf to *compute* the day of the month on which the ſhip had been ſeen in the *Delaware*. It was his duty to ſtate exactly his information, and leave the underwriter to make the computation. In inſurances on ſhips at a great diſtance, their being ſafe up to a certain day is always conſidered as a very important circumſtance."

when in fact ſhe was loſt on the 9th of *December*.—This repreſentation being the reſult of the inſured's *computation*, and though not fraudulent, avoided the policy.

Macdowall v. *Fraſer*, *Doug.* 247.

A miſrepreſentation in a material point equally vitiates the contract, whether it be the miſrepreſentation of the inſured himſelf or of his agent, and whether it proceed from fraud, miſtake, or negligence; for the inſurer is thereby

A miſrepreſentation, whether by the inſured or his agent, and whether fraudulent or innocent, avoids the contract.

(*a*) Inf. 341.

becauſe, though there were more than 20 men in the underſtanding of commercial men, yet there were not in fact 12 carriage guns: But this being a *repreſentation* and not a warranty, and the ſhip having a greater force than if ſhe had had 12 carriage guns; there was no fraud, the repreſentation being true in ſubſtance.(a)

Though the voyage be repreſented as being leſs than the voyage deſcribed in the policy, yet, if there be no fraud, and the voyage performed be within the policy, it will be protected.

. If a repreſentation ſhew that a leſs voyage is intended than that which is deſcribed in the policy, yet, if there be no fraud, and the voyage actually performed be within the policy, though greater than that mentioned in the repreſentation, it will be protected by the policy.

The voyage in a policy is deſcribed to be from *L'Orient*, to the *Iſles of France*, and *Bourbon*, *China*, *Perſia*, and during the ſhip's ſtay and trade, &c. A repreſentation deſcribes the voyage to be to *Madeira*, the *Iſles of France*, *Pondicherry*, *China*, and back by the *Iſles of France* to *L'Orient*:—Though the voyage deſcribed in the repreſentation be leſs than that mentioned in the policy, yet, being without fraud, and the voyage performed being within the policy, it is protected by the policy.

As where an inſurance was made, "At and from "*Port L'Orient* to the Iſles of *France* and *Bourbon*, to all "or any ports or places whatſoever in the *Eaſt Indies*, "*China*, *Perſia*, or elſewhere beyond the *Cape of Good* "*Hope*, from place to place; and during the ſhip's ſtay and "trade, backwards and forwards, at all ports and places, "and until her ſafe arrival back at her laſt port of diſ-"charge in *France*."—In an action on this policy, it appeared on the trial, that when the policy was ſubſcribed, there was a ſlip of paper wafered to it, and ſhewn to the underwriters, on which was written the following repreſentation: "The ſhip has had a complete "repair, and is now a fine and good veſſel, three decks. "Intends to ſail in *September* or *October* next; is to "go to *Madeira*, the *Iſles of France*, *Pondicherry*, *China*, "the *Iſles of France*, and *L'Orient*."—The ſhip ſailed on the 6th of *December* 1776; arrived at *Pondicherry* the 23d of *July* 1777; continued there till the 23d of *Auguſt*; when, inſtead of proceeding to *China*, ſhe ſailed for *Bengal*, where ſhe paſſed the winter; and, having there undergone conſiderable repairs, returned to *Pondicherry* early in 1778; from whence, having taken in her homeward cargo, ſhe ſailed for *L'Orient*; but was captured on

Bine v. *Fletcher*, at N. P. *Doug.* 278.

(a) This ſeemed to be the opinion of Lord *Mansfield*, and the court; though the principal ground of the judgment was, that almoſt all the underwriters conſidered the ſhip to be a ſhip without force, and the premium ſuited to ſuch a riſk.

on that voyage in *October* in that year. It appeared that ſhe ſpent much more time than is uſual, in her voyages to and from *Bengal*, having touched and ſtayed at ſeveral places both in going and returning, and that the difference of inſurance is one *per cent.* going to *Bengal* and not to *China*.—It was contended on the part of the defendant, that the repreſentations reſtrained the voyage inſured to the limits therein ſpecified; and ſome letters were read, which, it was ſaid, raiſed a preſumption that the neceſſity of going to *Bengal* was merely a pretence deviſed after the capture.—Lord *Mansfield* told the jury in ſubſtance, "That the firſt queſtion was, whether the policy was void on account of miſrepreſentation, which muſt be fraudulent, that is, *falſe* in a *material* inſtance, in reſpect to the riſk *run*. That the repreſentation meant to ſay; "I will have this underſtood as my preſent intention; "but I will have it in my power to vary it." That fraud is found out by the materiality of the point it is charged in; and if they thought that this was a wilful miſrepreſentation to avoid paying the one *per cent.* the defendant would be entitled to a verdict: But if no fraud was intended, and the real intention, at the time of the repreſentation, was to go to *China*, the plaintiff would be entitled to a verdict; for the inſured might change his intention and go to *Bengal*, that voyage being clearly protected by the policy, which, being expreſſed in more comprehenſive terms, gave a greater latitude than the repreſentation."—The jury accordingly found for the plaintiff. (*a*)

Even if a repreſentation as to the courſe of the voyage, be literally untrue, yet if it be made in conformity to an eſtabliſhed uſage of trade, and no perſon be deceived by it, and the voyage meant to be performed be within the policy, it will not avoid the contract.

Even if a repreſentation be untrue, it will not avoid the policy, if the inſurer be not deceived by it.

Thus:—An inſurance was made on goods on board a *Swediſh* ſhip, "At and from *London* and *Ramſgate* to *Nantz*, "with

A ſhip inſured from *London* to *Nantz*, with liberty to touch at *Oſtend*, clears out for *Oſtend* only, but means to go direct to *Nantz*, with

(*a*) Some part of this ſumming up is taken from Mr. *Park*'s note of this caſe, which differs materially from *Douglas*.

bills of lading, purporting to be made out at *Oſtend*, as if the goods had been ſhipped there, in order to be able to import *Engliſh* goods into *Nantz* at *Oſtend* duties, & alſo to ſave the light-houſe duties going down the *Channel*.—This being a conſtant practice, & known to all concerned in this trade, is no fraud on the underwriters.—Nor will the intention to evade the light-houſe duties render the contract illegal.—The policy being effected before, and the ſhip having ſailed after, a war broke out, does not affect the contract.

Planché v. *Fletcher*, *Doug.* 238.

"with liberty to call at *Oſtend*; being a general ſhip in "the port of *London* for *Nantz*."—There was a declaration in the policy that the inſurance was made on account of certain perſons, who, from their names, ſeemed to be *French* ſubjects.—The ſhip's clearances, and other papers from the cuſtom-houſe in *London*, were made out for *Oſtend only*, but the goods were ſhipped for *Nantz*, and the ſhip was intended to go directly to that place, without going to *Oſtend*. Bills of lading in *French*, dated the 18th of *July* 1778, were ſigned by the captain in *London*, but purporting to be made at *Oſtend*, and that the goods were ſhipped there, to be delivered at *Nantz*. The policy was ſubſcribed by the defendant the 7th of *July*, and the lading was taken in between the 24th of *July* and the 17th of *Auguſt*. The proclamation for making repriſals on *French* ſhips was publiſhed on the 31ſt of *July*. Two underwriters ſigned the policy after the proclamation at the ſame premium given before. The captain, as ſoon as he ſailed, deſtroyed the papers he had from the cuſtom-houſe in *London*. The ſhip ſailed on the 24th of *Auguſt*, and was taken by the *Engliſh*, and the goods condemned as *French* property.—In an action upon this policy, one objection made by the defendant was, that the ſhip had been cleared out for *Oſtend*, though ſhe was never deſigned for that place, which was a fraud on the underwriters.—That the fabrication of falſe and colourable papers, and the ſuppreſſion of the true deſtination of the ſhip, were circumſtances of fraud, tending to miſlead the underwriter, as to the voyage intended to be inſured, and the nature of the riſk.—To meet this objection, it was proved to be the conſtant practice, well underſtood by all perſons concerned in this branch of commerce, that all ſhips, going with goods of *Britiſh* manufacture to *France*, clear out for *Oſtend*, though they do not mean to go thither. The reaſons for this were, that the light-houſe duties are ſaved; which are payable when the voyage is known to be directly down the channel; and that the *French* duties are leſs upon goods from *Oſtend* than from *England*. A ſecond objection was, that, as hoſtilities were declared, after the policy was ſigned, and before the ſhip ſailed, the defendant ought to

to have had notice, that he might have exerciſed his diſcretion, whether he would chooſe, for a peace premium, to run the riſk of a capture; and it was the duty of the inſured to give the underwriter information that the ſhip continued in the river after the proclamation. It was alſo contended, that in time of war, the exportation of enemy's property in neutral bottoms was illegal, and that an inſurance on ſuch goods was void.—The plaintiff had a verdict; and, on a motion for a new trial, the court were clearly of opinion that he was entitled to recover.—Lord *Mansfield* ſaid;—"This verdict is impeached upon two grounds; *Firſt*, that there was a fraud on the underwriters in clearing out the ſhip for *Oſtend*, when ſhe was never intended to go thither. But I think there was no fraud on them, perhaps not on any body. What was practiſed in this caſe was proved to be the conſtant courſe of trade, and notoriouſly ſo to every body. The reaſon for clearing for *Oſtend*, and ſigning bills of lading, as from thence did not fully appear. But it was gueſſed at. The farmers of the revenue in *France* connive at the importation of *Engliſh* goods, and take *Oſtend* duties, rather than exact a tax which amounts to a prohibition. But at any rate, this was no fraud in this country. With regard to the evaſion of the light-houſe duties, the ſhip was not liable to confiſcation on that account. (*a*) The ſecond objection is, that the policy

(*a*) Though the ſhip might not have been liable to *confiſcation* for evading the light-houſe duties, yet, as one motive for clearing out for *Oſtend* was to commit a fraud againſt the laws of this country, this ſeems to be within the reaſon of the caſes in which the policy has been holden to be void where the voyage has been undertaken for illegal purpoſes. Vid. ch. 3. § 1. & 2. & ch. 5.—According to the foreign writers, a deviation is excuſable, if it be to avoid a toll eſtabliſhed contrary to the law of nations: *Nauta excuſatur ſi hoc faceret cauſâ conſervandi jus ſuum, quia vectigal erit illicitum. Straccha* de navib. p. 3, n. 8. But if the captain deviate to avoid a toll or duty lawfully authorized, this will diſcharge the inſurers. *Si, pour éviter un péage légitime et autoriſé, le capitaine s'écartoit de la voie ordinaire, il ſeroit en faute; par conſequent, les aſſureurs ſeroient déchargés des riſques. Emerig.* tom. 2, p. 60.

icy was made before, and the ſhip ſailed after, the proclamation for repriſals. But a war was at that time expected by every man in both countries; the ambaſſadors of both were recalled; the fleets at ſea, waiting for each other to fight; and the *Pallas* and *Licorne* taken from the enemy. It is indifferent whether the goods were *French* or *Engliſh*: The riſk inſured extends to all captures; and as the ſame premium was accepted after the proclamation, that was paid before, it appears that the war-riſk was in view when the defendant ſigned.—Shall he avail himſelf of an event which increaſes the riſk, but which he had in contemplation when he underwrote the policy?"

If it be ſtated that a ſhip was *ready to ſail* on a certain day, when in fact ſhe had ſailed, this is a miſrepreſentation.

Every repreſentation reſpecting the ſtate of the ſhip, and the time of her ſailing, is material; and therefore if it be ſtated that a ſhip was *ready to ſail* on a certain day, when in fact ſhe had ſailed the day before, this is both a miſrepreſentation and a concealment, and will avoid the policy. (*a*)

(*a*) Per Lord *Mansfield* in *Fillis* v. *Brutton*, at N. P. *Park* 182, inf. 348.

CHAP. X.

Of Concealment.

CONCEALMENT, or *suppressio veri*, is nearly allied to misrepresentation, or *allegatio falsi*, and consists in the fraudulent suppression of any fact or circumstance material to the risk. *Dolus malus non tantum in eo est, qui fallendi causâ obscurè loquitur; sed etiam qui insidiosè obscurè dissimulat.* (*a*) This, like every other fraud, avoids the contract *ab initio*, upon principles of natural justice. For, as the facts upon which the risk must be estimated, generally lie within the knowledge of the insured, or of his agents, the underwriter must, in most cases, rely on him for all the necessary information to enable him to decide, upon what terms he will take upon himself the proposed risk; and he computes the premium, and enters into the contract, in the confidence that the insured, being fully informed of all circumstances relating to the intended voyage, has dealt fairly with him, and has kept back nothing which it might be material for him to know.

A fraudulent concealment avoids the contract.

But it is not merely on the ground of *fraud* that a concealment avoids the contract: Even a concealment which is only the effect of accident, negligence, inadvertence, or mistake, will be equally fatal to the contract, as if it were intentional and fraudulent. (*b*) Nor can the insured, by tendering any increase of premium, require the insurer to confirm it; for the insurer has a right to say that he would not have subscribed the policy, upon any terms, if he had not been deceived. (*c*)

Even an innocent concealment, if material, will avoid the policy.

It

(*a*) ff. l. 43, § 2, de dolo malo.—(*b*) Per Lord *Mansfield*, in *Carter* v. *Boehm*, 1 *Bl.* 594, 3 *Bur.* 1909, and in *Ratcliffe* v. *Shoolbred*, inf. 349.—(*c*) Vid. *Emerig.* tom. 1, p. 20.

The insured should therefore disclose all material circumstances.

It therefore behoves the insured, from motives of common prudence, to inform himself of every fact and circumstance which may throw the smallest light on the nature and perils of the proposed adventure; and he is bound by principles of moral honesty to disclose to the insurer all such circumstances with the most unreserved candour and frankness.

In this chapter we will consider,

1. What shall be deemed a material concealment;
2. What things need not be disclosed.

Sect. 1.

What shall be deemed a material Concealment.

Whatever respects the state of the ship, the time of sailing, &c. should be disclosed.

EVERY fact and circumstance which can possibly influence the mind of the insurer in determining whether he will underwrite the policy at all, or at what premium he will underwrite it, is material. Therefore, whatever respects the state of the ship, the time of her sailing, the nature of the employ in which she is to be engaged, &c. ought to be fully and explicitly disclosed; and the keeping back any fact of this sort, will be fatal to the contract. And, in such case, the concealment so vitiates the policy, that it will afford the insured no remedy, even for a loss arising from a cause unconnected with the fact or circumstance concealed; for a concealment is to be considered, not with reference to the event, but to its effect, *at the time of making the contract.* (*a*)

The broker's instructions state that the ship was ready to sail on the 24th of *December*, when in fact she had sailed on the 23d.—This is a material concealment and misrepresentation.

As where an insurance was made on a ship from *Plymouth* to *Bristol*, and it appeared that the broker's instructions stated that the ship was ready to sail on the 24th of *December*, when, in fact, she had sailed on the 23d.—Lord *Mansfield* ruled that this was a material concealment and misrepresentation: He said;—"In all insurances it is essential to the contract, that the insured should represent the true state of the ship, to the best of his knowledge. On

Fillis v. *Bruton*, at N. P. *Park*, 182.

(*a*) Vid. *Seaman* v. *Fonnereau*, 2 *Str.* 1183, inf. 352.

On that information the underwriters engage. If he ſtate that as a *fact*, which he does not know to be true, but only believes it, this is a miſrepreſentation. He is bound to tell the underwriters truth. The material point in this caſe, therefore, is, had the ſhip ſailed or was ſhe in port?" The jury, upon this direction, found for the defendant.

So, where an inſurance was made on a ſhip, "At and "from the coaſt of *Africa*, to her laſt diſcharging port "in the *Weſt Indies*."—She ſailed from the coaſt of *Africa*, on the 2d of *October*, and was captured on the 6th of *December*.—On the 22d of *February*, the owner received information that ſhe was well, and had ſailed from *Africa* on the 2d of *October*; and on the ſame evening wrote to a broker to get an inſurance made on her, adding theſe words;—"As ſhe is *rather long*, and we do not think it "prudent to run ſo large a riſk at ſo critical at a time. "We expect to hear of her ſoon."—Fearing, however, that if ſome intimation were not given of the information they had received, this might affect the policy, they ordered the broker to add to his inſtructions, "*The above ſhip was on the coaſt the 2d of October*," but ſaid nothing of her having *ſailed* on that day.—On the trial, it was objected, that there had been a material concealment of the true ſtate of the ſhip.—Lord *Mansfield* told the jury that the inſured were bound to repreſent to the underwriters all the material circumſtances relative to the ſhip and the voyage. That if he did not, though the omiſſion were by accident or negligence, the underwriters were not liable. *A fortiori*, if he ſuppreſſed or miſrepreſented from *fraud*: That the plaintiffs in this caſe, having concealed a material part of the information they received, it was a fraud, and the inſurers were not liable.—The jury under this direction, found for the defendant.

The inſured, knowing that his ſhip had *ſailed* from the coaſt of *Africa* on a certain day, only ſtates that ſhe was *on the coaſt*, on that day. This is a material concealment.

Ratcliffe v. *Shoolbred*, at N.P. MS. *Pard*, 181.

The following caſe, though upon a mere queſtion of fact, will ſhew to what length the courts will go upon a well-grounded ſuſpicion of fraudulent concealment.

A well-founded ſuſpicion of a concealment will amount to proof of fraud.

One

An intimate friend of the owner of a ſhip hearing of her being loſt, informs his clerk of the misfortune; and he, the ſame day, by order of the owner, writes to have an inſurance effected on the ſhip:—The concealment by the clerk avoided the policy, even ſuppoſing the owner himſelf quite innocent.

Stewart v. *Dunlop*, in Dom. Proc. April 18, 1785. *Park*, 209.

One *Boog* at *Greenock*, a friend of the owner of the ſhip *Peggy*, and partner with him in ſome other adventures, was informed by a perſon juſt arrived at *Greenock*, that the *Peggy* was taken. *Boog deſired it might be concealed*, and the ſame day had a converſation with the owner's clerk; but the clerk, in his evidence, depoſed, that at no part of that day had he any converſation with, or information from *Boog*, relative to the *Peggy*, *nor any hint* from him or any other perſon relative to the making of any inſurance upon her, further than *Boog*'s aſking him, '*if he knew whether there was any inſurance made upon her.*' Afterwards the clerk, by the deſire of the owner, wrote to get an inſurance effected, which he did without ſtating a word to his maſter of the converſation with *Boog*.—Upon this caſe, though it did not appear that the owner knew of the loſs at the time he ordered his clerk to write, yet it was decreed by the Lords of Seſſion in *Scotland*, and their decree afterwards affirmed in the Houſe of Lords, that the inſurance would not have been made, if the intelligence of the capture of the *Peggy* had not arrived at *Greenock* the preceding day; and that therefore the policy was void.

The reaſon of this deciſion ſeems to be, that though no knowledge of the loſs, at the time of making the inſurance, was brought home to the owner himſelf, yet what paſſed between the clerk and *Boog* muſt have been deemed ſufficient proof that he knew of the loſs at the time he wrote the letter; and his concealment of that was ſufficient to avoid the policy.

Concealment of the time of the ſhip's ſailing avoids the policy.

M'Andrews v. *Bell*, Eſp. Rep. 373.

So where the plaintiff received on the 24th of *November* a letter from *Liſbon*, dated the 8th of the ſame month, that the ſhip *was ready to ſail*, but did not make the inſurance on the receipt of the letter, nor till the 2d of *December*, after the arrival of another ſhip which ſailed at the ſame time with the ſhip inſured, and did not then communicate the contents of the letter to the underwriters.—Lord *Kenyon* held this to be a concealment which avoided the policy. (*a*)

(*a*) Vid. *Webſter* v. *Foſter*, Eſp. Rep. 407, and *Chaurand* v. *Angerſtein*, *Peake*, 43.

If a ship is to be employed in a service of peculiar danger, this should be stated to the insurers.

It is in some cases necessary to state to the underwriters the nature of the service in which the ship is to be employed. If this be attended with any extraordinary danger, the concealment of it will avoid the policy.

Emerigon (*a*) reports the following decision to prove this proposition.—A ship was chartered by the commissaries of the *French* army, and the owner caused her to be insured, without mentioning the nature of the service she was to be employed in, which was very likely to be attended with extraordinary risk: In fact the commissaries were under the orders of the commanding officer, in the execution of which the ship was lost. It was decreed in the Parliament of *Aix* that the insurers were not answerable.

A material concealment is fatal, though the fact concealed was not disclosed, because the broker thought it immaterial.

It is advisable for the broker or agent to disclose all he knows respecting the proposed adventure, and not to presume to exercise his own judgment upon the materiality of any part of it; for if, in representing the state of the ship, and the last intelligence concerning her, he do not disclose the *whole*, and what he conceals shall appear to be *material*, the contract will be void, though the concealment be without any intention of fraud, but merely because *he thought* the matters concealed *immaterial*. (*b*)

Even doubtful rumours respecting the safety of the ship ought to be disclosed.

Even doubtful rumours respecting the safety of a ship which is meant to be insured *lost or not lost*, how little credit soever the owner himself may give them, ought to be faithfully disclosed to every underwriter; and the withholding such information will avoid the contract.

Da Costa v. *Scandret*, 2 P. W. 170.

As where a man, having a doubtful account that a ship, like one belonging to himself, had been captured, caused his ship to be insured, without giving any notice to the underwriters of what he had heard.—In this case it was determined that the insurance was void; for though the insured had no certain intelligence that his ship was taken; yet, if he had fairly disclosed what he had heard, it must be supposed that the underwriters would at least have insisted on a higher premium, if they would have insured at all.

So,

(*a*) Tom. 1, p. 172.—(*b*) Per Cur. in *Shirley* v. *Wilkinson*, *Doug.* 306.

The owner of a ſhip having received uncertain intelligence of her being loſt in a ſtorm, gets her inſured, without diſcloſing this information:—The inſurance is void, and though the ſhip is well after the ſtorm, yet the inſurer ſhall not be anſwerable for a ſubſequent capture.

Seaman v. *Fonnereau*, at N. P. 2 *Str.* 1183.

So, where an inſurance was made on the ſhip *Davy* on the 25th of *Auguſt*, and it appeared that the agent for the inſured had received a letter from *Cowes* two days before, dated the 21ſt of *Auguſt*, wherein the writer informed him 'that he had been in company with the '*Davy* on the 12th, and at midnight loſt ſight of her 'all at once; that ſhe was leaky the day before, and the 'next day there was a hard gale.'—The ſhip however continued on her voyage till the 19th, when ſhe was taken.—Though there was no pretence of any knowledge of the actual loſs at the time of the inſurance, which was made in conſequence of a letter, received the 25th of *Auguſt*, from the owner abroad, dated the 27th of *June*; yet it was holden by Lord C. J. *Lee*, that this was a concealment which avoided the policy; and that it was not material that the loſs was not ſuch as the letter imported; for a concealment is to be conſidered with reference to its effect *at the time of the contract*, and not to be judged of by ſubſequent events. He therefore thought this a ſtrong caſe for the defendant, and the jury found accordingly.

The non-compliance with an ordinance, though it be contrary to the law of nations, ought to be diſcloſed.

In the caſe of *Mayne* v. *Walter*, which we have already noticed, (*a*) it appears that by a *French* ordinance, all ſhips were declared liable to capture, whereof the ſupercargo ſhould be the ſubject of a ſtate at war with *France*; and it ſeems to have been the opinion of Lord *Mansfield*, that though this ordinance was contrary to the law of nations, yet, that if a neutral inſured knew of ſuch an ordinance, and had not complied with it, he was bound to diſcloſe this circumſtance to the underwriters, and the withholding it would have been a fatal concealment.

A concealment by an underwriter will avoid the policy, as to him.

The obligation of a ſtrict obſervance of good faith, is equally binding on both parties in all contracts; and in that of inſurance, the underwriter, as well as the inſured, is bound to diſcloſe all circumſtances within his knowledge affecting the riſk. If, therefore, it appear that, at the time he underwrote the policy, he knew that the ſhip was arrived ſafe, the contract will be void as to him, and

(*a*) Sup. 323.

and an action will lie against him to recover back the premium. (*a*)

Sect. 2.

What things need not be disclosed.

BUT either party may be innocently silent as to many matters which are open to both, and upon which they may both exercise their judgments. *Aliud est celare, aliud tacere: Neque enim id est celare quicquid reticeas; sed eum quod tu scias, id ignorare, emolumenti tui causâ, velis eos, quorum interfit, id scire.* (*b*) This definition of concealment, restrained to the efficient motives and precise subject of any contract, will generally hold to make it void in favour of either party who is misled by his ignorance of the thing concealed.

Cicero's rule.

How understood.

The insured may be innocently silent as to what the underwriter knows as well as he, however he may have come by his knowledge: *Scientia utriusque par pares contrahentes facit.* The insured therefore needs not mention what the underwriter *ought* to know, what he takes upon himself the knowledge of, or what he waves being informed of. The underwriter needs not to be told what lessens the risk agreed upon, and is understood to be comprised within the express terms of the policy. He needs not be told what is the result of political speculations, or general intelligence: For instance, he is bound to know every cause which may occasion natural perils; as the difficulty of the voyage; the variation of seasons; the probability of lightning, hurricanes, &c.: He is bound to know every cause which may occasion political perils, from the rupture of states, from war, and the various operations of war: He is bound to know the probability of safety from the continuance and return of peace, from the imbecility of the enemy, the weakness of their councils, or their want of strength.

The insured need not disclose what the underwriter knows, or what he ought to know.

Nor what lessens the risk.

Nor general topics of speculation.

What the insurer is presumed to know.

If

(*a*) Per Lord *Mansfield*, in *Carter* v. *Boehm*, 1 *Bl.* 594, 3 *Bur.* 1909.—(*b*) Cic. de off. l. 3, c. 12, 13.

If an underwriter inſure private ſhips of war from ports to ports, and from places to places, any where; he needs not be told the ſecret enterprizes upon which they are deſtined; becauſe he knows that ſome expedition muſt be in view; and, from the nature of the caſe, he waves the information. If he inſure for a certain term, he needs not be told any circumſtance to ſhew that the riſk may be over in leſs time: Or if he inſure a voyage, with liberty of deviation, he needs not to be told what tends to ſhew that there will be no deviation.

Neither is it neceſſary to communicate to the underwriters that the ſhip inſured is foreign built, though this enabled her to ſail without convoy, and without a licenſe to do ſo, being within the exception in the ſtat. 38 *G.* III. c. 76, § 6; it being the buſineſs of the underwriter to obtain this information for himſelf. (*a*)

Things need not be diſcloſed, which are equally open to both parties.

Men argue differently from natural phenomena and political appearances: They have different capacities, different degrees of knowledge, and different intelligence: But the means of information and judging upon thoſe ſubjects are open to both: Each profeſſes to act from his own ſagacity; and therefore neither needs to communicate to the other.

Thoſe things only need be diſcloſed, which the one privately knows, and the other has no reaſon to ſuſpect.

The reaſon of the rule which obliges the parties to a mutual diſcloſure of all material information, is to prevent fraud and promote good faith: But it is applicable to ſuch facts only as vary the nature of the contract, which one party privately knows, and the other is ignorant of, and has no opportunity of knowing, nor any reaſon to ſuſpect. The queſtion, therefore, in caſes of concealment, muſt always be, whether there was, under all the circumſtances, at the time the policy was underwritten, a full and fair ſtatement, or a concealment: Fradulent, if deſigned; or, though not deſigned, varying materially the object of the policy, and changing the riſk underſtood to be run (*b*); and in both caſes avoiding the contract.

It

(*a*) R. *Long* v. *Bolton*, 2 *Pul.* & *Boſ.* 209.—(*b*) Per Lord *Mansfield* in *Carter* v. *Boehm*, 1 *Bl.* 594, 3 *Bur.* 1909.

It is a rule, that it is unneceſſary to make any communication or diſcloſure of that which the inſured undertakes for by a warranty expreſs or implied; and therefore it is not neceſſary that there ſhould be any repreſentation as to the ſtate or condition of the ſhip previous to the effecting of the policy; becauſe, in every contract of inſurance, there is an implied warranty that the ſhip is ſea-worthy. This was determined in the following caſe.

There need be no previous repreſentation as to the ſtate of the ſhip, that being covered by the implied warranty that ſhe is ſea-worthy.

An inſurance was made on a ſhip and cargo from *Madeira* to *Charleſtown*.—The ſhip being captured in her voyage to *Charleſtown*, an action was brought on the policy, in which it appeared that the captain had wrote two letters from *Madeira* to the owner, ſtating that the ſhip had been very leaky on her voyage thither, and that the pipes of wine had been half covered with water: But, in anſwer to this, it was proved that the leak had been completely ſtopped before the ſhip ſailed from *Madeira*.—It was inſiſted, however, that the not diſcloſing of the two letters was a material concealment which avoided the policy.—Lord *Mansfield* told the jury, "that there was no neceſſity to communicate the letters to the underwriter, or to ſhew the condition of the ſhip or cargo at the end of the former voyage. "It is true," ſaid he, "that there ſhould be a repreſentation of every thing relating to the riſk, which the underwriter has to run, except it be covered by a warranty. But it is a condition, or implied warranty, in every policy, that the ſhip is ſea-worthy, and therefore there is no neceſſity for a repreſentation of that. If ſhe ſail without being ſo, the policy is void. The letters might be material evidence to ſhew that the ſhip was leaky in her outward voyage; and if nothing had been done to her at *Madeira*, there would have been ground to ſuppoſe that ſhe was not ſea-worthy when ſhe ſailed from thence. But the fact now appears that the leak was ſtopped, and ſhe was in good condition before ſhe ſailed from *Madeira*:" Accordingly there was a verdict for the plaintiff.

Letters, therefore, from the captain, deſcribing the bad ſtate of the ſhip in her outward voyage, need not be ſhewn to the underwriters in a policy on a ſubſequent one.

Shoolbred v. *Nutt*, at N. P. after Hil. 1782, MS.—S. C. *Park*, 229.

Emerigon

Nor is it neceſſary to ſtate what may reaſonably be preſumed.

Emerigon (*a*) mentions a caſe from which it may be inferred, that, in ſome inſtances, the ſtate of the ſhip ought to be repreſented to the inſurers, and that, in others, the inſurers will be preſumed to know that the ſhip is not ſea-worthy. That was the caſe of a ſhip taken by a *French* privateer, after an action in which ſhe loſt her main and mizen maſts. The captain of the privateer brought the prize to an anchor, and immediately ſent orders to get her inſured, which was done, but without mentioning the ſtate ſhe was in. The ſhip being retaken by the *Engliſh*, the inſurers objected to pay the loſs, becauſe the debilitated ſtate of the ſhip had not been ſtated to them. They were condemned, however, to pay the full ſum inſured, upon the ground that they ought to have preſumed that a veſſel captured, after a battle, muſt have been damaged.

Or what either party may know.

The following caſe will ſhew that the inſured is not bound to diſcloſe a circumſtance made material by a foreign ordinance, which may be known by either party, but which neither is bound to know, and which neither in fact knows.

Nor a circumſtance made material by a foreign ordinance, of which he was ignorant.

Mayne v. *Walter*, E. 22 G. III. B. R. MS.—S. C. *Park* 195.

An inſurance was made on a *Portugueze* ſhip, warranted neutral, at and from *Madeira* to her port of diſcharge in *Jamaica*, with liberty to touch at the *Leeward Iſlands*.—The ſhip was captured by a *French* privateer, and condemned in the court of admiralty in *France*, on the ground of her having an *Engliſh* ſupercargo on board; the *French* having lately made an ordinance to authorize this, ſimilar to one made in 1756.—In an action to recover this loſs, it was inſiſted for the defendant, that the plaintiff ought to have diſcloſed to him that the ſupercargo was *Engliſh*.—But it was determined by Lord *Mansfield* and the court, that if neither party knew of this arbitrary ordinance, which was againſt the law of nations, neither was guilty of any fault. If the defendant knew of it, he ought to have inquired what ſupercargo was on board. But, in this caſe, both being ignorant of this ordinance, both

(*a*) Vol. 1, p. 172.

both were innocent; and in ſuch caſe, the underwriter muſt run all riſks.

I ſhall conclude the preſent chapter with the following ſingular caſe, which, though not upon a marine policy, turned upon a queſtion of concealment.

The governor of a fort abroad inſures it againſt capture for a year: It is not neceſſary to diſcloſe his ſpeculations on the probability of an attack.

Carter v. *Boehm*, 3 *Bur.* 1905, 1 *Bl.* 593.

An inſurance was made for a year, from the 16th of *October* 1759, againſt the capture of *Fort Marlborough*, in the iſland of *Sumatra*, by an enemy; for the benefit of the governor *Geo. Carter*.—The governor's inſtructions for the inſurance were dated the 22d of *September* 1759, and the policy was ſigned in *May* 1760. The fort was taken by Count *D'Eſtaigne* within the year, viz. in *April* 1760, and an action brought to recover the loſs.—On the trial it was objected that there was fraud on the part of the inſured, by the concealment of circumſtances which ought to have been diſcloſed; particularly the weakneſs of the fort, and the probability of its being attacked by the *French*. This was offered to be proved by two letters; one from the governor to *R. Carter* his brother and agent; and the other to the *India* company, from which it appeared that the *French*, being unable to relieve their friends on the coaſt, were the more likely to make an attack on this ſettlement, which they had deſigned to take by ſurprize the year before; and that the broker who effected the policy, on his croſs examination, ſaid that *in his opinion*, theſe letters ought to have been produced or the contents diſcloſed; for if they had, the policy would not have been underwritten. —In reply to this, it was ſhewn that the governor had 20,000 l. in effects in the fort, and only inſured 10,000 l.; that it did not appear that the *French* had any deſign to make the attack till the end of *March*; that the governor had acted as in full ſecurity down to *February*, and in that month turned his money into goods; and that, though his office was mercantile and not military, he was guilty of no fault in the defence of the place, which was not calculated to reſiſt an *European* force, but only for defence againſt the natives.—The plaintiff had a verdict. —A new trial was moved for, on the ground that all the circumſtances were not ſufficiently diſcloſed to the underwriters.

writers.—But the court, after time taken to deliberate, were clearly of opinion that the plaintiff was entitled to recover, and that the verdict ought to ſtand.—Lord *Mansfield*, in delivering the opinion of the court, ſaid;—"The contingency was, whether *Fort Marlborough* would be attacked by an *European* power, by *ſea*, between *October* 1759 and *October* 1760. If it was, it muſt be taken, being incapable of reſiſtance. The underwriter in *London*, in *May* 1760, could judge much better of the probability of this contingency, than governor *Carter* could at *Fort Marlborough* in *September* 1759. He knew the ſucceſs of the operations of the war in *Europe*, what naval forces the *Engliſh* and *French* had ſent to the *Eaſt Indies*, and whether the ſea was open to any attempt from the *French*. He knew, or might have known, every thing which was known at *Fort Marlborough* in *September* 1759, of the general ſtate of affairs in the *Eaſt Indies*, or of the particular condition of *Fort Marlborough*, by the ſhip which brought the orders for the inſurance. (*a*) Under theſe circumſtances, he inſures againſt the general contingency of the place being attacked by an *European* power. If there had been any deſign on foot or enterprize begun in *September* 1759, it would have varied the riſk underſtood by the underwriter, on account of his not being told of a particular deſign *then ſubſiſting*. But the governor had no notice of ſuch a deſign, nor was there, in fact, any ſuch deſign. The attempt was made without premeditation, from the ſudden opportunity of a favourable occaſion, by the connivance of the *Dutch* which tempted *D'Eſtaigne* to break his parole.—As to the *firſt* concealment, that he did not diſcloſe the condition of the place,—The underwriters knew that the inſurance was for the governor, who muſt be acquainted with the ſtate of the place, and who

(*a*) There is nothing in the report of this caſe from whence it can be fairly inferred, that the underwriter knew, or might have known, all theſe things. The probability ſeems to be the other way; nor is it any excuſe for a concealment, that the underwriter might, by inquiring, have learned all that it was neceſſary for him to know.

who could not diſcloſe it conſiſtently with his duty; (*a*) but, by inſuring, he apprehended at leaſt the probability of an attack. With this knowledge, and without aſking a queſtion, he underwrote; and, by ſo doing, he took the knowledge of the ſtate of the place upon himſelf; though it was a matter about which he might have been informed various ways: It was not a matter within the private knowledge of the governor only. But, independent of that, it is enough that the fort was in the condition in which it ought to be, which was only to reſiſt the natives; in like manner as that a ſhip inſured is preſumed to be ſea-worthy. The contingency inſured againſt was, whether the place would be attacked by an *European* force, and not whether it would be able to reſiſt ſuch an attack, if the ſhips could get up the river. It was found that this was the contingency in the contemplation of the parties.—The *ſecond* concealment was, his not having diſcloſed that the *French*, not being able to relieve their friends on the coaſt, might make an attack on him. This was mere ſpeculation dictated by fear, and not a fact in the caſe. It was a bold attempt for the conquered to attack the conqueror in his own dominion. The practicability of it depended on the *Engliſh* naval force in thoſe ſeas, of which the underwriter could better judge at *London* in *May* 1760, than the governor at *Fort Marlborough* in *September* 1759.—The *third* concealment was that he did not diſcloſe the deſign of the *French* to attack the place the year before. That deſign reſted merely in report; but taking it in the ſtrongeſt light, it is the report of a deſign the year before; but then dropped.—Another ſilence, not objected to was, that it appeared by the governor's letter to his agent, that he was apprehenſive

(*a*) The argument here uſed is not quite conſiſtent with a ſubſequent part of this judgment, where, to prove that no fraud was imputable to the governor, it is ſaid,—"By the ſame "conveyance which brought his orders to inſure, he wrote to "the company every thing which he knew or ſuſpected; and "deſired nothing to be kept a ſecret which he wrote either to "them or his brother."

henſive of a *Dutch* war: That he had good grounds for this apprehenſion appeared from the ſubſequent conduct of the *Dutch*, to whom the loſs of the place was owing. The reaſon why the counſel did not object to this concealment was, becauſe it muſt have ariſen from political ſpeculation, and general intelligence; and it is not neceſſary to diſcloſe ſuch things to an underwriter.—With reſpect to the opinion of the broker, the jury were not bound to pay the leaſt regard to it. It was mere opinion, after the event. If rightly formed, it could only be drawn from the ſame premiſes from which the court and jury were to determine the cauſe; and therefore improper and irrelevant in the mouth of a witneſs.—With reſpect to the governor, there was no ground to impute fraud to him. By the ſame conveyance which brought his orders to inſure, he wrote to the company every thing he knew or ſuſpected. He deſired nothing to be kept ſecret which he wrote to them or to his brother. (*a*) The reaſon of the rule againſt concealments is, to prevent fraud and encourage good faith. (*b*) If the defendant's objections were to prevail, in the preſent inſtance, the rule would be turned into an inſtrument of fraud. The underwriter, knowing that the governor apprehended danger, and that he muſt have ſome ground for his apprehenſion, being told nothing of either, ſigned the policy, without aſking a queſtion. If the objection, "that he was not told" be ſufficient to vacate it, he took the premium.

(*a*) What he wrote to the company was not likely to be made public, and therefore not likely to come to the knowledge of the underwriter! What he wrote to his brother ought to have been diſcloſed: And though this concealment might not be imputable to the governor as a *fraud*, yet its effect in avoiding the policy would be the ſame. It is ſaid that he deſired nothing to be concealed: But a concealment without the deſire, or even againſt the will, of the inſured, will avoid a policy. Vid. ſup. 335.—(*b*) We have his Lordſhip's authority, and the authority of plain reaſon, for ſaying, that a concealment may avoid a policy, and yet be quite innocent. Vid. ſup. 347.

mium, *knowing* the policy to be void, (*a*) in order to gain if the alternative turned one way, and make no ſatisfaction, if it turned out the other. There was not a word ſaid to him of the affairs of *India*, or the ſtate of the war there, or the condition of *Fort Marlborough*. If he thought that omiſſion an objection at the time, (*b*) he ought not to have ſigned the policy, with a ſecret reſerve in his own mind to make it void: If he diſpenſed with the information, (*c*) and did not think this ſilence an objection then, he cannot take it up now after the event."

I have ſtated this celebrated caſe, and the arguments in ſupport of the judgment, more at length than was conſiſtent with the plan of this work; and I have taken the liberty to make ſome ſhort remarks, in the form of notes, on ſeveral paſſages, which appeared to me diſputable. For with all the veneration and deference which I feel for the diſtinguiſhed character and talents of the noble perſon who delivered that judgment, the duty of the taſk which I have impoſed upon myſelf obliges me to declare, that I have not been able to ſatisfy my own mind that it is warranted even by the principles which his lordſhip himſelf lays down as the baſis of it. (*d*) A ſtronger caſe of an inſurance againſt the policy of the law could ſcarcely be put than one in which the inſured lays himſelf under the neceſſity either of revealing that which

(*a*) How could the underwriter *know* that the policy was void by reaſon of a concealment, without knowing what was concealed? Upon whom does the obligation lie; the inſured to diſcloſe what he knows, or the underwriter to fiſh it out by aſking queſtions? The argument goes to prove, that if the underwriter aſk no queſtions, the inſured is obliged to diſcloſe nothing; which is true only with reſpect to matters of public notoriety.—(*b*) How could he judge of the omiſſion, without knowing what was omitted?—(*c*) How could he be ſuppoſed to diſpenſe with information, when the ſilence of the inſured was, according to all practice, a proof that he had none to communicate?—(*d*) Theſe principles which are, in general, abſtract propoſitions of indiſputable truth, and are laid down with admirable clearneſs and preciſion, will be found in the beginning of this chapter.

which his duty as governor forbade him to diſcloſe, or of concealing from the underwriters thoſe things which it was material for them to know, and which juſtice would require him to communicate. It is ſaid, however, "that the caſe ſo ſeldom happens, that little danger is to be apprehended from the example."—That ſuch an inſurance is without example may be urged as one argument againſt its legality. But if a contract, which is contrary to principles of public convenience be once ſanctioned by high authority, no man can foreſee to what extent the miſchievous principle may afterwards be carried.—But then it is alſo ſaid, "that this objection could not, upon any ground of juſtice, be made by an underwriter, who knew the inſured to be governor at the time he took the premium."—This goes to prove that an underwriter who takes a premium upon an inſurance which he knows to be illegal, cannot afterwards object to the illegality of it.—This, *as between the inſurer and the inſured*, would undoubtedly be juſt: But principles of public convenience demand that the juſtice of the caſe, as between the parties, ſhall ſometimes yield to a higher conſideration, namely, the probable operation of the precedent upon public morals, or the public intereſt. (*a*)

(*a*) Vid. ſup. 49.

CHAP.

CHAP. XI.

Of the Ship.

IN every marine insurance the ship must always be an object of great interest to both parties. From the nature of the contract, there are certain stipulations or conditions implied in it, relative to the ship, which the insured is bound to fulfil. These are, that the ship shall be sea-worthy; that she shall not be changed, unless from necessity, without the consent of the insurers; and that she shall be conducted and navigated according to law. These matters which embrace all that will be necessary to say on the subject of the ship, will be considered under the following heads:

1. Of the sea-worthiness of the ship;
2. Of changing the ship;
3. Of insurances on goods in "*ship or ships*;"
4. Of the conduct of the ship.

Sect. 1.

Of the Sea-worthiness of the Ship.

No loss arising from the internal defect of the thing insured can fall upon the insurer.

IT is clear, from the authority of all the writers on the subject of marine insurances, as well as upon principles of natural justice, that no loss occasioned by the internal defect of the thing insured, shall fall on the insurer; and therefore, if the ship be found incapable of performing the voyage insured, and her inability do not proceed from any accident or misfortune, or from the violence of the winds or waves, but from latent defects, existing before the voyage commenced, the insurer is discharged. (*a*)

There is an implied warranty in every policy, on ship or goods, that the ship shall be sea-worthy.

There is, moreover, in every insurance, whether on ship or goods, an implied warranty that the ship shall be sea-worthy when the risk commences; that is, that she shall be *tight, staunch and strong, properly manned, provided with all necessary*

(*a*) *Le Guidon*, c. 5, art. 8, *Valin*, tom. 1, p. 654, tom. 2, p. 80. *Pothier*, h. t. n. 66. *Emerig.* tom. 1, p. 580, Ord. de la mar. h. t. art. 12. 2 *Mag.* 90, 140.

neceſſary ſtores, and in all reſpects fit for the intended voyage. —The conſideration of the inſurance is paid, in order that the inſured may be indemnified againſt certain contingencies; and it ſuppoſes that the inſurer may gain the premium: But if the ſhip be incapable of performing the voyage, there is no poſſibility of the inſurers gaining the premium, and in that caſe, the contract, on his part, would be without conſideration, and conſequently void.—The inſurer undertakes to indemnify the inſured againſt the *extraordinary and unforeſeen perils of the ſea*; and it would be abſurd to ſuppoſe that any man would inſure againſt thoſe perils, but in the confidence that the ſhip is in a condition to encounter the *ordinary perils* to which every ſhip muſt be expoſed in the uſual courſe of the voyage propoſed.

In *France*, every ſhip is ſurveyed before the voyage commences.

By the law of *France* it is directed, that every merchant ſhip, before her departure from the place of her out-fit, ſhall be ſurveyed by certain officers appointed for that purpoſe, and reported to be ſea-worthy, (*en bon état de navigation*;) and that, previous to her return, before ſhe takes her homeward cargo on board, ſhe ſhall be again ſurveyed.—*Valin* (*b*) ſhews how little confidence he placed in theſe ſurveys, which, he ſays, are only made upon the external parts, for the ſhip is not unſheathed, and therefore the inward and hidden defects are not diſcovered. Indeed it ſeems to be much better to leave the validity of the policy to depend on the ſea-worthineſs of the ſhip, to be aſcertained after a loſs has happened, by an inveſtigation of the true cauſe, than to permit ſo important a queſtion to be decided by the report of mercenary officers. A ſhip may, to all appearance, be perfectly capable of performing a voyage, and it is only after a loſs has happened that her latent defects are diſcovered, and her true ſtate at the time of her departure comes to be known. Nor was the ſurvey thus made by the *French* concluſive to prove that the ſhip at her departure was ſea-worthy. It raiſed a *preſumption* that

But the report upon ſuch ſurvey was not ſufficient proof of ſea-worthineſs.

(*b*) Tit. *fret.* ſur. art. 12.

that ſhe was ſo; but it ſtill remained open to the inſurers to ſhew the contrary.

A ſhip ſhall be *preſumed* not to have been ſea-worthy, unleſs it be made appear that her diſability aroſe from ſea-damage or other misfortune.

As the inſurer is only liable for loſſes ariſing from the *extraordinary and unforſeen perils of the voyage*, if the ſhip become innavigable, or incapable of proceeding on the voyage inſured, all the writers agree that the *preſumption* ſhall be that this proceeded from the age and rottenneſs, or other defect of the ſhip, unleſs it be made *appear* to have been occaſioned by ſea damage or ſome unforeſeen accident. (*a*) The reaſon aſſigned for this is, that, by the marine law, an *indefinite* innavigability is never claſſed among the perils to which the inſurer is liable; becauſe a thing ſo ſubject to be injured by time and the uſe which is made of it, cannot be ſuppoſed always to retain its original ſtate; and that, though a ſhip may, at the time of her departure, appear capable of performing the voyage inſured; yet, if the voyage ſhould prove longer than uſual, her internal defects will ſometimes become apparent, from time, from the preſſure of the cargo, and from the action of the ſeas, without any extraordinary accident.

A ſhip ſpringe a leak at ſea, and is forced by contrary winds to run for the neareſt port, where ſhe is pronounced innavigable:—Whether this ſhall be *preſumed* to have ariſen from her not having been ſea-worthy when ſhe ſailed.

Caſaregis, (*b*) in ſupport of this doctrine, cites the following deciſion of the *Rota* of *Florence*.—A ſhip, with a cargo of goods on board, ſailed from *Cadiz* for *Amſterdam*; and when ſhe was off *Cape St. Vincent*, ſhe was forced by a ſtrong north wind to put into *St. Croix de Teneriff*, to avoid foundering. Being there ſurveyed, ſhe was, by the conſul, pronounced to be *innavigable*.—The inſured inſiſted that the above circumſtances amounted to ſufficient evidence of the loſs, which could only be attributed to the contrary winds, which, having cauſed the ſhip to ſpring a leak, had rendered her innavigable.—The inſurers replied that the inſured were bound to give *concluſive* evidence of the loſs; that the witneſſes examined

(*a*) *Targa*, ch. 60, p. 256. *Pothier*, h. t. n. 66. *Caſaregis* diſ. 142, n. 15. *Valin*, ſur. art. 28, 29, & 46, h. t. p. 76. In p. 98, he ſays, "La preſomption eſt, que le mauvais état du navire vient de ſon propre vice."—(*b*) Loc. cit.

ished by the conſul did not depoſe that the loſs was occaſioned by the contrary winds; that the leak did not ſhew a right to abandon, becauſe in the courſe of a voyage it ſometimes happens to the beſt ſhips to ſpring a leak, without any extraordinary ſea-damage.—The judges of the *Rota* adopted theſe reaſons, and decided in favour of the inſurers. Their judgment was delivered to the effect following:—The queſtion being, whether the ſhip had been declared innavigable on account of the violence of the contrary winds, or on account of ſome peculiar and inherent vice, *it has appeared to us*, that this being the caſe of innavigability, it ought rather to be attributed to the inherent vice of the ſhip. The bad condition of the ſhip is *preſumed* to proceed from an ancient, certain, inherent, natural, and conſtantly-operating cauſe, rather than from the effect of the winds, which is accidental and extrinſic. (*a*) Decay and rottenneſs are reputed the moſt active and moſt powerful cauſes from which innavigability can proceed. (*b*) A ſtorm is not deemed a ſufficient cauſe of a loſs, if this can be ſhewn to have proceeded from the inherent vice of the thing inſured. The mere *poſſibility* that the injury has not been occaſioned by the ſea, is enough to ſhew that the proof of the inſured is inſufficient. (*c*)

Emerigon, however, holds that, in conſideration of the previous ſurvey, the preſumption that the ſhip was ſeaworthy when ſhe ſailed ſhall prevail till the inſurers ſhew the contrary; and he cites a number of deciſions of the admiralty

(*a*) Totum damnum referri debet cauſæ antiquiori, originali, certæ, et intrinſecæ fragilitatis et vetuſtatis navis, n. 22.—(*b*) Vitium intrinſecum infectionis et corruptionis reputandum ſit pro cauſâ potentiori, et majoris activitatis, ex prædictis, cui propterea principaliter effectus eſt attribuendus, n. 24.—(*c*) Sola poſſibilitas in contrarium ſufficit, ut probatio non dicatur ſufficiens, n. 36, &c.

admiralty court of *Marſeilles* upon this point, from which it would ſeem that no evidence of the rottenneſs, or of the decayed ſtate in which the ſhip may be found *after ſhe ſails*, is ſufficient to countervail the report of the previous ſurvey. (*a*)

And it muſt be owned that, in practice, though the rule, as laid down by the writers above cited, ought never to be loſt ſight of, many difficulties may ariſe from too ſtrict an obſervance of it. Where a ſhip is loſt, or is condemned in the courſe of the voyage, as being incapable of proceeding to her place of deſtination, and this cannot be aſcribed to ſtreſs of weather or any accident in the voyage, the fair and natural preſumption is, that ſhe was not ſea-worthy; and then it is incumbent on the inſured to ſhew that, at the time of her departure, ſhe was in fact ſea-worthy. This preſumption is founded upon principles of public policy, which require that the ſhip, at the time of her departure, ſhall be in ſuch a ſtate as to be capable of encountering the ordinary perils of the voyage inſured; and this muſt be the true meaning of the words, "*tight, ſtaunch, and ſtrong*," uſed in charter-parties. However perfect a ſhip may be in herſelf, yet, if ſhe be incapable from the nature of her conſtructure, or any other cauſe, of performing the voyage inſured, with the propoſed cargo on board, ſhe is not ſea-worthy. She muſt be, in all reſpects, fit for the trade in which ſhe is meant to be employed. And it is a wholeſome rule that the inſured ſhall be held to pretty ſtrict and cogent proof of this. It is alſo a wholeſome rule, that this proof ſhall not only be cogent and ſtrong to ſhew the ſhip's ſufficiency at the time ſhe ſailed, but alſo that the inſured ſhall bring forward *all* the evidence which he has upon the ſubject; particularly what

(*a*) *Valin*, ſur art. 29 h. t. ſeems to have theſe deciſions in his mind when diſcuſſing this point, he ſays,—"On cite ſur ce ſujét pluſiers arrets d'*Aix* et des ſentences de *Marſeille* contre les aſſureurs; mais ces prejugés, pour etre juridiques, doivent avoir été rendus ſur des preuves *que les navires avoient été rendus innavigables par fortune de mer*. Ce pendant qu' eſt ce que ces preuves pour l'ordinaire? Des procès verbaux frauduleux de la part des capitaines, toujours diſpoſés à favoriſer les armateurs, ſans egard à la vérité et la juſtice."

what relates to the ſtate ſhe was in when the loſs happened, or when ſhe was condemned as unfit to proceed on the voyage. If any thing ſhould be withheld which the inſured might have produced, it will always throw great ſuſpicion on his caſe. Too much often reſts on the ſingle teſtimony of the maſter, always inclined to favour his employers. (*a*)—If, on the other hand, it appear from the facts of the caſe, that the loſs may be fairly attributed to ſea-damage or any other unforeſeen misfortune, but yet the inſurers mean to allege that the ſhip at her departure was not ſea-worthy, the *onus probandi* will lie on them. This ſeems to be the ſimpleſt rule; and the ſimpleſt rules are always the beſt, particularly in matters of commerce.

If the loſs or diſability of the ſhip may be fairly aſcribed to ſea-damage, the proof of unſea-worthineſs lies on the inſurers.

If it be clearly aſcertained that the ſhip, at the time of her departure, was not in a condition to perform the voyage inſured, neither the innocence or ignorance of the inſured, nor any precautions he may have taken to make her ſea-worthy, will avail him againſt the breach of his implied warranty.

Neither the ignorance or innocence of the inſured will avail him againſt a breach of this implied warranty.

Thus: The plaintiff had purchaſed a ſhip, and after having her ſurveyed by proper perſons, ſent her into dock, and there had her fully repaired; and the ſhip-builder was ready to ſwear that he had effectually repaired her, as he thought, having done all that was requiſite to make her a good ſhip. Being then taken into government ſervice, ſhe was, as uſual, ſurveyed by the perſons employed for that purpoſe, and reported to be a good ſhip, ſhe ſailed out of the *Thames*, and arrived at *Portſmouth*; but being very leaky with bad weather, the admiral ordered her to go into port, and undergo a ſurvey there. This was done, and it was found, on opening her, that ſome timbers near her keel were very bad; inſomuch that ſhe was condemned as inſufficient to proceed. The plaintiff having inſured her, brought an action on the policy to recover the loſs; and at the trial inſiſted that he had a right to prove, and could prove, that he had done every thing in his power to ſend her out a good and ſufficient ſhip; but that her diſability was

The purchaſer of a ſhip ſends her to be docked and completely repaired, and the ſhip-builder is ready to ſwear that this was done; yet if it afterwards appear that ſhe was not ſea-worthy, tho' this proceeded from a latent cauſe, the policy is void.

Lee v. *Beach*, at N. P. after M. 1762.

(*a*) Vid. ſup. 367, n.

was the effect of a *latent cause*, not known to him or discovered when she was surveyed, or in the dock repairing.—Lord *Mansfield*, who tried the cause, said that it appeared that the ship had *died a natural death*, and had received her death's blow before the risk commenced; and, however innocent the plaintiff might be, and however cautiously he had acted, the underwriter was equally innocent; and the implied warranty must and ought to have its effect; and he nonsuited the plaintiff.

And the insured's being unacquainted with the state of the ship, does not alter the case.

Oliver v. *Cowley*, at N. P. after Tr. 1765.

So, where an insurance was made on goods on board the *Amy and Lætitia*, at and from *Montserat* to *London*, the ship sailed the 16th of *July*, and the next day, without any bad weather, she was found to be very leaky, and obliged to run for the island of *St. Thomas*, where she was unloaded, and the goods, being much damaged, were sold. In an action on the policy to recover for this loss, it was agreed, on the one hand, that the ship was not sea-worthy to undertake the voyage insured; and on the other, that the insured was totally ignorant of this, when the goods were shipped.—The plaintiff was nonsuited. Lord *Mansfield* said, that the implied warranty could not be dispensed with in any case: However, as it was a question of law, he would save the point; but the plaintiff's counsel declined this, being satisfied that it was against them.

If the ship be not sea-worthy, the policy will be void, though both the insured and the captain believed her to be sea-worthy; and though the insurers knew the state she was in as well as the owners.

Though the owners may not know the true state and condition of the ship in a distant part of the world, yet, if they insure, the law will presume that the master, or some other agent, will take care that the ship be sea-worthy before she sails. Hence it is, that though a ship has been long absent in the remotest parts of the world, if an insurance be made on her homeward passage, the warranty that she was sea-worthy at the time of her departure, is as strongly implied in the contract, as if she had sailed from an *English* port. And though no fraud be imputable to the insured; though they supposed, or believed, that the ship was in all respects sea-worthy; though no blame be imputable to the master, or any other agent of the insured; and though the underwriters were as well acquainted with the state and condition of the ship as the owners; yet, if in fact she was not sea-worthy

ſea-worthy at the time of her ſailing, the contract will be void. Theſe principles will be found fully eſtabliſhed in the following caſe.

Mills and another v. *Roebuck*, *Park*, 221.

An inſurance was made on a ſhip called the *Mills Frigate*, loſt or not loſt, "from the *Leeward Iſlands* to *London*, "beginning the adventure from her arrival at the *Leeward* "*Iſlands*."—In an action on this policy, the declaration ſtated the loſs to have ariſen, from divers leaks ſprung by the ſhip, from the ſtarting of planks, and occaſioned by tempeſtuous weather and the mere perils of the ſea. Upon the trial of the cauſe, it appeared,—'That the ſhip was *French* built, and the defendant knew her to be ſuch: That the bolts of ſuch ſhips being iron, grow ruſty and break; and then the timbers ſuddenly become looſe, and the ſhip is thereby rendered incapable of bearing the ſea, without any *viſible* marks of decay: That ſhe had been generally employed by the plaintiffs in the *Weſt India* trade, and large ſums conſtantly inſured on her: That before ſhe ſailed on her laſt voyage, ſhe was put into complete repair; but her iron bolts could not then be examined without taking off her ſheathing, which had not long before been put on: That the firſt underwriter on the policy, with others, kept a regiſter of all ſhips inſured by them, containing a particular deſcription of each, and employed a ſurveyor to examine them: That the *Mills Frigate* had long been entered in this regiſter, and, before her laſt voyage, was examined by the ſurveyor, and found fit to undertake the voyage *to and from* the *Leeward Iſlands*: That the firſt underwriter knew as much of the condition of the ſhip as the plaintiffs, and underwrote 400 l. on her outward voyage: That at *St. Kitts* ſhe had ſuch a repair as was deemed ſufficient for her homeward voyage, but her bolts could not be examined there: That at *Nevis*, where a loading was expected, the planters, knowing ſhe had been leaky on her outward voyage, refuſed to put ſugars on board her; but to ſatisfy them, a ſurvey was made by ſix captains, who reported that ſhe was ſtrong and ſound, and, when caulked, would be fully ſufficient to carry a cargo to *London*: That ſhe was accordingly caulked, and during

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two months, while ſhe was loading, continued tight: That the day after ſhe ſailed from *Nevis*, without any bad weather, ſhe ſprung a leak, which obliged the captain to bear away for *St. Kitts*, where ſhe arrived in two days, and it was there found that ſhe had ſtarted a plank, and on being ſurveyed, ſhe was reported to be unfit to proceed on her voyage, without a thorough repair, which would coſt more than the value of the ſhip and freight; and which, at all events, could not be had at *St. Kitts*, for want of docks and materials, and that ſhe was unfit to ſail elſewhere to be repaired: That the ſtarting of the plank was owing to the iron bolts being rufty and decayed and breaking off in the plank; and that as other bolts might be in the ſame ſtate, it was concluded that the ſhip was not, at the time ſhe ſailed from *Nevis* for *London*, fit to perform that voyage; and this the captain now believed, though, to all outward appearance, ſhe was a good ſhip, and, as he thought when he ſailed from *Nevis*, *proper for the voyage*; but had he known the decayed condition of her bolts before he ſailed on his homeward voyage, he would not have ventured his life in her: That while the ſhip was at *St. Kitts*, the captain wrote to the plaintiffs, giving them an account of his outward voyage; mentioning the bad weather he had had, and the *looſened, weak, and leaky ſtate of the ſhip*, and the neceſſity he was under of having *her upper works new nailed*: That the plaintiffs gave this letter to a broker to get an inſurance made on the ſhip, freight, and cargo; which being ſhewn to the firſt underwriter, he choſe to inſure the ſhip, ſaying, ſhe would come home ſafe enough, notwithſtanding the damage ſhe had received, it being a ſummer voyage; but ſhe would very likely damage her cargo; and being about to underwrite 300 l. the broker told him he was a bold man to write ſo much, after reading the letter, upon which he altered the *three* into a *two*: That the broker ſhewed the ſame letter to all the other underwriters before they underwrote.—The defendants demurred to this evidence, upon which the court gave judgment for them.—A writ of error was then brought in the *Exchequer Chamber*, which was referred to Lord *Mansfield*

field and Lord C. J. *Wilmot*, who after argument, reported their opinion to be in favour of the defendants, and judgment was given for them accordingly.'(*a*)

Obſervations on the above caſe.

The principles upon which this opinion was founded were not publickly declared, becauſe it is not uſual, upon a writ of error from the court of *Exchequer* to the *Exchequer Chamber*, for the judges, to whom it is referred, to deliver their opinions publickly. It is evident, however, that it muſt have been decided on the ground that the ſhip, at the time ſhe ſailed from *Nevis*, was not ſea-worthy; and that for this cauſe, the policy was void, though theſe things were clear; 1ſt, That the plaintiffs were innocent; 2dly, That the underwriters, at the time they ſubſcribed the policy, knew as much of the ſtate and condition of the ſhip as the plaintiff did; and, 3dly, That no blame was imputable even to the captain, or any other agent of the plaintiffs. In the caſe of *March* v. Lord *Pigot*, this is alleged by counſel in argument to be the ground of this deciſion. (*b*) But Lord *Mansfield* is there made to deny it. Little regard, however, ſeems to be due to this report; not only becauſe the facts of the caſe of *Mills* v. *Roebuck*, will warrant a deciſion in favour of the defendant upon no other ground than that of the ſhip's not being ſea-worthy; but alſo becauſe Lord *Mansfield* is made in that report to deny and confirm this doctrine almoſt in the ſame breath.

In what caſes the *inſurer*, and in what caſes the *owners* ſhall make good the damage done to goods from the inſufficiency of the ſhip.

Where the goods inſured have ſuſtained a damage in the voyage from the inſufficiency of the ſhip, the queſtion, whether the owner or maſter of the ſhip be liable to make good the loſs, depends on the queſtion whether the ſhip was in a condition to perform her voyage at the time of her departure, or became defective from ſtreſs

(*a*) Before this action in the Exchequer was brought, an action on the ſame policy had been tried in the court of Common Pleas, before Lord *Camden*, who directed the jury to find for the plaintiff. But upon a motion for a new trial, he altered his opinion, and the court unanimouſly determined that the ſhip, not being ſea-worthy, the plaintiffs, however innocent they might be, could not recover.—(*b*) 5 *Bur.* 2804.

ſtreſs of weather and the perils of the ſea. (*a*) But it is ſufficient if the ſhip be ſea-worthy at the time of her ſailing. She may ceaſe to be ſo in twenty-four hours after her departure, and yet the underwriters will continue liable. The queſtion, however, in ſuch caſes, will always be, whether her diſability aroſe from any defect exiſting *before* her departure, or from a cauſe which occaſioned it *afterwards*. But if a ſhip, within a day or two after her departure, become leaky and founder at ſea, or be obliged to put back, without any viſible or adequate cauſe to produce ſuch an effect, the natural preſumption is, that ſhe was not ſea-worthy when ſhe ſailed; and it will then be incumbent on the inſured to ſhew the ſtate ſhe was in at that time.

It is ſufficient if the ſhip be ſea-worthy at her departure.

But if a defect appear ſoon after her ſailing, without any viſible cauſe, the inference is, that ſhe was not ſea-worthy when ſhe ſailed.

It is unneceſſary to make any *repreſentation* of the condition of the ſhip to the inſurer, previous to the effecting of the policy; for it is a rule that no repreſentation need be made of matters relating to the riſk which are covered by a warranty. (*b*)

It is unneceſſary to make any previous *repreſentation* of the ſtate of the ſhip.

But a ſhip, to be ſea-worthy, muſt not only be tight, ſtaunch, and ſtrong, and provided with all neceſſary ſtores for the voyage propoſed; it is, as has been already obſerved, a condition or warranty, implied in the contract, that the ſhip ſhall be properly *manned*, by perſons of competent ſkill and ability to navigate her. And therefore, if ſhe be ſuffered to ſail in a river, or other place of difficult navigation, without a pilot properly qualified, the underwriters will be diſcharged: for this is a breach of the above condition.

To be ſea-worthy, the ſhip muſt be properly *manned*.

Thus: A ſhip inſured from *Stettin* to *London* took a pilot on board at *Orfordneſs*, on entering the *Thames*, who quitted her at *Halfway Reach*; after which, and before ſhe came to her moorings higher up the river, ſhe ſtruck upon a ſhip's anchor, which entered her bottom, in conſequence of which ſhe ſunk and filled with water before ſhe had been moored twenty-four hours.—In an action on the

A ſhip takes a pilot on her entrance into the *Thames*, but he is permitted to leave her before ſhe is ſafely moored, and an accident afterwards happens: The inſurers are diſcharged, though it do not appear that the loſs was directly imputable to any want of ſkill

(*a*) Vid. *Valin* h. t. tom. 1, p. 164.—(*b*) Per Cur. *Shoolbred* v. *Nutt*, ſup. 355.

in thoſe who navigated the veſſel.

Law v. *Hollingsworth*, 7 T. R. 160.

the policy, the plaintiff obtained a verdict, and upon a motion to ſet this verdict aſide, and enter a nonſuit, it was objected that there was actual negligence in the management of the ſhip, by not keeping the pilot on board till ſhe had been moored in ſafety.—Upon this ground the court were clearly of opinion that the underwriters were diſcharged.—Lord *Kenyon* ſaid,—"The principle upon which this caſe muſt be determined, ſeems to be admitted on all hands, namely, that the inſured cannot recover on a policy of inſurance unleſs the ſhip be equipped with every thing neceſſary to her navigation during her voyage. She muſt be ſea-worthy, ſhe muſt have a ſufficient crew, and a captain and pilot of competent ſkill. But in this caſe the captain did not perform his duty; for he had no pilot on board when the accident happened. If the underwriters had been previouſly informed that there would be no pilot on board during a great part of the ſhip's paſſage up the river, probably they would not have undertaken the riſk. On the ground, therefore, that there was no pilot on board when the accident happened, I am of opinion that there muſt be judgment of nonſuit."

Sect. 2.

Of changing the Ship.

The ſhip mentioned in the policy cannot be changed unleſs through neceſſity, or with the leave of the inſurers.

WE have already had occaſion to obſerve that, in almoſt all caſes of inſurance upon goods, it is neceſſary to ſpecify in the policy the ſhip in which they are to be tranſported. Without having this aſcertained, the underwriter would be unable to form a juſt eſtimate of the riſk he is to run. (*a*) It is therefore, in general, a part of the contract, that the adventure ſhall be on board the very

(*a*) Vid. *Roc.* h. t. n. 28. *Santerna*, h. t. p. 3, n. 35. *Stracca*, gloſ. 8. n. 10, vid. ſup. 220.

very ſhip ſo ſpecified, and no other. And if, before the commencement of the voyage, another ſhip be ſubſtituted for the one mentioned in the policy, or if, during the voyage, the goods inſured be removed into another ſhip, without any *neceſſity*, and without the conſent of the inſurers, the underwriter is diſcharged. (*a*)

Some authors have thought that the underwriters are not diſcharged by a change of the ſhip, even without neceſſity, or the conſent of the inſurers, unleſs the new ſhip be worſe than that mentioned in the policy. (*b*) So that if the goods inſured be removed to as good a ſhip, the underwriters will remain liable. Others doubt this doctrine. (*c*) But with us, the nature and form of the contract entitle the underwriters to ſay that they had more confidence in the ſhip named in the policy, than in any other; and that, therefore, they cannot be bound to run the riſk in another, though a larger and better ſhip, without their conſent, or without neceſſity. Such alſo is the law of *France* on this point. (*d*)

It is not neceſſary to have a clauſe in the policy to enable the inſured to change the ſhip in caſe of neceſſity.

Molloy, however, ſeems to think that the naming of the ſhip in the policy amounts to an abſolute warranty, and that if the goods be removed to any other ſhip, though from *neceſſity*, the inſurer is diſcharged, unleſs there be a clauſe in the policy to warrant ſuch removal. (*e*) But this is too rigid a conſtruction of the terms of the policy, and contrary to the conſtant practice of all commercial countries. (*f*) At preſent no ſuch clauſe as that mentioned by *Molloy* is ever found in the policies of any country; and this, of itſelf, is a ſufficient proof that the liberty of changing the ſhip, in a caſe of neceſſity, does not require a ſpecial clauſe to warrant it.

Lord *Mansfield*, in delivering the opinion of the court in the caſe of *Pelly* v. *Royal Ex. Aſſ.* (*g*) ſays,—"One objection

(*a*) *Le Guidon*, ch. 9, art. 4. *Roccus*, n. 9, *Emerig.* tom. 1, p. 423. *Valin*, art. 26, h. t. *Conſol. del mare*, ch. 87, & 89. *Mal.* lex merc. 118.—(*b*) *Roccus*, n. 57. *Straccha* de naut. art. 3. n. 10. *Caſaregis*, diſc. 1, n. 33.—(*c*) Vid. *Emerig.* tom. 1, p. 424.—(*d*) *Emerig.* tom. 1, p. 425.—(*e*) *Molloy*, b. 2, c. 7, § 11.—(*f*) Vid. *Mal.* lex merc. 118.—(*g*) 1 *Bur.* 351.

jection was made, by comparing this case to that of changing the ship or bottom on board of which goods are insured, which the insured have no right to do.—Answer: There, the *identical ship is essential*; for that is the thing insured: But that case is not like the present."—Perhaps it may be inferred from this, that Lord *Mansfield* meant to lay it down as a rule, without any exception, that the ship can in no case be changed. The reporter does not state the objection alluded to by his lordship; and the answer in which he is stated to have said, 'that the identical ship is the thing insured,' shews that the reporter must have misapprehended him. But, be that as it may, his lordship could only mean to lay down the *general rule*, without stating those exceptions arising from necessity, which the general scope of his argument seems strongly to warrant.

A man insures on any ship he shall come in from A. to B. Interest or no interest. The ship he sails in springs a leak, he removes to another, and arrives safe; but the first ship is taken: The insurer is liable.

Dick v. *Barrell*, at N. P. 2 *Str.* 1248.

Yet, where a man insured, "interest or no interest, on "*any ship he should come in*, from *Virginia* to *London*, be- "ginning the adventure on his embarking on board such "ship; the money to be paid, though his person should "escape, or the ship be retaken."—He embarked on board the *Speedwell*; but, she springing a leak at sea, he went on board the *Friendship*, and arrived safe in *London*; but the *Speedwell* was taken after he left her.—Lord C. J. *Lee* held that the underwriter was liable;—"For," said he, "the insurance is on the ship the insured set out in: *And had that got safe home* and the other been lost, he could not have recovered upon the ground of having removed his person into that ship in the middle of the voyage."

Observations on this decision.

On a first view of this case, an inference seems to arise from it, that even necessity will not warrant the changing of the ship. But it is to be observed, that the ground of the decision is expressly stated to have been, that the insurance was on the *ship the insured first sailed in*, and not on his *person*. Besides, for any thing that appears, the necessity was not great enough to warrant his leaving the *Speedwell*. But, be that as it may, this is but a loose note of a case at *nisi prius*, and is by no means sufficient to establish a principle contrary to constant practice and

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the uſage of other countries, and which might be extremely injurious to the intereſts of commerce.

The point, however, is now clearly ſettled in the following caſe, in which it was determined that the ſhifting of the goods inſured from one ſhip to another, does not diſcharge the inſurer, if this be done from neceſſity; and that the captain may even diſpoſe of goods ſaved from ſhipwreck, and inveſt the proceeds in the produce of a foreign country, and theſe being laden on board another ſhip, will ſtill be protected by the policy.

But the ſhip may not only be changed from neceſſity, but the proceeds of goods ſaved from ſhipwreck may be inveſted in new goods; and the riſk will continue on theſe in a new ſhip.

An inſurance was made on the ſhip *Duras*, "At and "from *Marſeilles* to *Madeira*, the *Cape*, Iſles of *France* "and *Bourbon*, and to all places in the *Eaſt Indies*, from "place to place, during her ſtay and trade there, and "till her return back to *France*, upon any kind of goods "and alſo on the ſhip."—The plaintiffs were intereſted in bullion and other goods on board, conſigned to their correſpondents at *Pondicherry*, with directions to barter or ſell the ſame on their account, and to make the returns to *Europe* in other goods, the produce of *India*.—On the outward voyage the *Duras* was loſt at the *Iſles of France*. Great part of the bullion, and a conſiderable part of the goods were ſaved, but damaged. Theſe, without any authority from the underwriters, were ſent forward in another ſhip to *Pondicherry*, where they were diſpoſed of by the plaintiff's correſpondents, who inveſted the produce in *Indian* goods, and ſhipped them, on the plaintiff's account, on board the *Pére de Famille*, for *France*.—This ſhip ſailed from *Pondicherry* in *Auguſt* 1778; but in her voyage home, was condemned, at the *Iſles of France*, as unfit to proceed to *Europe*; whereupon the goods were put on board the *Louiſe*, bound for *France*, which ſhip was taken by an *Engliſh* privateer and condemned. On the 29th of *Auguſt* 1778, ſeveral underwriters on the policy ſigned a memorandum thereon, whereby they agreed to run the riſk on the goods ſaved in any other ſhip or ſhips till their ſafe arrival in *France*: But the defendant and ſeveral other underwriters refuſed to ſign this agreement.—The defendant paid into court the whole of the average loſs occaſioned by the loſs of the *Duras*. By the loſs

An inſurance is made on any kind of goods, and on the ſhip, from *France* to the *Eaſt Indies*, and back to *France*. The ſhip being loſt in the outward voyage, part of the goods are ſaved and ſent in another ſhip to *India*, and the produce thereof converted into goods there and ſent for *France* in another ſhip, which being diſabled, they are put on board a third ſhip, which is captured. The riſk on the goods ſaved in the ſecond ſhip, and alſo on the goods on the homeward voyage continues; and the inſurers are liable for the loſs.

Plantamour v. *Staples*, M. 22 G. III. B. R. M. S. 1 T. R. 611, n.

loſs of the *Louiſe*, the plaintiffs ſuſtained a loſs of 12 *per cent.* on the ſum ſubſcribed; which was paid by the underwriters who ſigned the memorandum, but refuſed by the reſt, and to recover which this action was brought.—The court, upon the above caſe, were clearly of opinion that the plaintiffs were entitled to recover. Lord *Mansfield* ſaid,—"The only queſtion is, whether the ſhipping of the goods to *Europe* was neceſſary to the ſalvage. It is admitted that the defendant is liable upon the voyage to *Pondicherry, though the goods were conveyed in another ſhip;* therefore that circumſtance makes no difference. The ſale of the cargo is alſo admitted to have been neceſſary. Then, how were the proceeds to be remitted to *Europe?* What was the beſt way of getting home the money for the benefit of the inſured and inſurers? Beyond all doubt the beſt way was to inveſt it in other goods. Therefore, that being done, which was the beſt which could be done, the underwriters are liable."—Mr. Juſtice *Buller* ſaid,—"There is no caſe that expreſsly decides that the captain may inveſt the produce of the goods ſaved, in other goods. But in *Mills* v. *Fletcher*, (*a*) it was decided that the captain has a general power, and is bound in duty, to do the beſt for all concerned: And what was done in this caſe was manifeſtly for their intereſt."

When the beſt is done that can be done for the intereſt of all parties, the underwriters remain liable.

If, in the courſe of the voyage, the ſhip be diſabled, by ſtreſs of weather, or any other peril of the ſea, the captain ought to hire another veſſel for the tranſport of the goods, and proceed on the voyage, if, under all the circumſtances of his ſituation, it be for the intereſt of all concerned that he ſhould do ſo. (*b*)

The captain ought to hire another ſhip, if it be for the intereſt of all concerned that he ſhould do ſo.

In

(*a*) *Doug.* 219, inf. c. 14, § 2.—(*b*) By the *Rhodian* law, (ff. l. 10, § 1,) the captain is releaſed from all his engagements if the ſhip, by the perils of the ſea, and without any fault on his part, become incapable of proceeding on her voyage. *Vinnius* (p. 295,) ſays that the captain, in ſuch caſe, is not obliged to ſeek another veſſel. *Non cogitur aliam quærere navem quia de certe nave actum eſt.* The laws of *Oleron*, (art. 4.) and

In ſuch caſe the inſurers ſhall pay all average loſſes on the goods, the expenſe of ſalvage, unloading, warehouſing, and reloading, together with all duties that may have been paid, and the increaſe of freight, if any. In ſhort, they muſt bear every expenſe which is the neceſſary conſequence of changing the ſhip. (*a*)

To what expenſes the underwriters are liable in ſuch caſe.

Sect. 3.

Of the Inſurance of Goods on board of Ship or Ships.

IN the foregoing ſection it has been ſhewn, that by ſpecifying the ſhip or veſſel in which the goods inſured are to be tranſported, it becomes a part of the contract that the adventure ſhall be on board the very ſhip or veſſel ſo ſpecified; and that no other can be ſubſtituted in her place, unleſs from neceſſity, or with the conſent of the underwriters. (*b*)

In policies on goods, the ſhip is generally ſpecified.

It frequently happens, however, particularly in time of war, that merchants have goods in diſtant countries, which

But they may be inſured on board *any ſhip or ſhips.*

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and thoſe of *Wiſbuy* (art. 16, 37, 55,) ſay that the captain *may hire* another ſhip. The law of *France* (ord. mar. tit. *du fret.* art. 11.) declares that if the ſhip be diſabled, and the captain cannot get her repaired, *he ſhall be obliged to hire another immediately*, if he can procure one.—*Pothier* (des chartes parties n. 68,) and *Valin*, (tit. du fret, art. 11, vol. 1, p. 618,) ſay that this means only that the captain is bound to hire another veſſel, if he would earn his whole freight. *Emerigon* (vol. 1, p. 428) holds that the captain being the agent, not only of the owners of the ſhip, but alſo of the ſhippers of the goods, is bound, in the abſence of both, to uſe his beſt endeavours to preſerve the goods, and to do all that, in his circumſtances, he thinks will moſt conduce to the intereſt of all concerned.—In his quality of captain, he has the entire care of the ſhip and cargo, and is anſwerable for both. As to the goods, he is bound to do with them, what it may be preſumed the ſhippers would do, were they preſent. This ſeems to be the wiſeſt and beſt rule, and that which Lord *Mansfield* laid down in the above caſe of *Plantamour* v. *Staples*, ſup. 377.—(*a*) *Emerig.* tom. 1, p. 432, 576, 681.—(*b*) Vid. ſup. 220.

which they mean to import from thence, but know not by what ſhips they may be ſent, and their agents are often glad to avail themſelves of the firſt that offer for that purpoſe. In ſuch caſes, it is of great importance that the owners of ſuch goods ſhould be at liberty to inſure them, without ſpecifying the ſhips or veſſels they may be ſhipped on board of,—and then the form of the policy is, upon ſuch goods, '*on board any ſhip or ſhips*;' and this mode of inſuring is ſo well eſtabliſhed, both by uſage and authority, that the legality of it is now become indiſputable. (*a*)

If two policies be made, for different ſums, on goods in *ſhip or ſhips*, and the goods be put on board two ſhips, and one is loſt; whether the underwriters on both policies ſhall contribute.

If two inſurances, for different ſums, be made, each on goods on board *ſhip or ſhips*, on behalf of the ſame perſon, and for the ſame voyage; and goods amounting to the value in both policies, but in different proportions, be put on board two ſhips, which ſail on the voyage inſured; and nothing be done to appropriate either policy to the goods on board of either ſhip, and one of them be loſt; it would ſeem that this ought to be conſidered as but one inſurance on the entire goods, by two policies, and that the underwriters on both ought to contribute to the loſs.

But otherwiſe if each policy be appropriated to the goods in a particular ſhip.

But the following determination will ſhew that if, in ſuch caſe, the inſured appropriate each policy to certain ſpecific goods on board the reſpective ſhips they may be ſent by, and one be loſt, the underwriters on the policy appropriated to the goods on board of that ſhip, ſhall be alone anſwerable.

Two policies, the one for 6000 l. and the other for 4000 l. are made on goods on board *ſhip or ſhips*, on the ſame voyage; and goods to the amount of both policies are put on board two ſhips, though not in thoſe proportions, but it is declared that one is to be covered by the 6000 l. policy. —This ſhip

The plaintiff in *India* wrote to his correſpondent in *England* to get two inſurances effected on his account; one for 6000 l. on goods on board *any ſhip or ſhips* which ſhould ſail from *Bengal* to *London* between the firſt of *November* 1779, and the firſt of *July* 1780; the other for 4000 l. on goods on board *any ſhip or ſhips*, which ſhould ſail on the ſame voyage, between the firſt of *February* and the 31ſt of *December* 1780. The two inſurances were accordingly effected, and the plaintiff loaded goods to the amount of 4889 l. on board the *General Barker*,

(*a*) Vid. *Kewley* v. *Ryan*, 2 H. Bl. 343. ſup. 231, inf. 382. *Emerig.* tom. 1, p. 173.

Barker, and to the amount of 4500 l. on board the *Ganges*; and entered a certificate before the chief justice in *Bengal*, that he had put such goods on board the one, and such on board the other; and that he had shipped on board the *General Barker* (*a*) 4889 l. of the risk intended to be covered by the 6000 l. policy.—Both ships sailed within the time mentioned in the first policy. The *Ganges* arrived safe, but the *General Barker* was lost.—The plaintiff brought an action on the policy for 6000 l. which he contended he had a right to apply to the *General Barker*, and went for a total loss. At the trial two objections were made: 1st. That no evidence could be given of the declaration made by the plaintiff in *India*; 2dly, That there ought to be a contribution, and all the underwriters on both policies called upon as for an average loss; and that the plaintiff ought only to recover in the proportion of 4889 l. to 4500 l. or, at most, as 4889 l. was to 1111 l.—Lord *Mansfield*, who tried the cause, over-ruled the objection as to the evidence, and admitted the declaration in *Bengal* to be read, and was of opinion that by it the plaintiff had fixed the application of the 6000 l. policy entirely to the *General Barker*, and a verdict was found accordingly.—Upon a motion for a new trial, the court held that the plaintiff had a right to apply the 6000 l. policy to the *General Barker*; but ordered 1111 l. to be deducted out of the 6000 l. for what had been saved.—The plaintiff therefore recovered 4889 l. the value of the goods put on board that ship.

being lost, the insured shall recover on the 6cool. policy only.

Henchman v. *Offley*, M. 23 G. III. B R. MS. S C. 2 H. Bl. 345. n.

A declaration made before a magistrate in in *India*, that a particular cargo shall be covered by a particular policy, may be read in evidence here.

So, if two distinct insurances be made on goods for the same person, and the same voyage; the one on board a specific ship, the other on board *any ship or ships*; and the former arrive safe, but the latter is lost: the insured shall apply the policy on the goods on board *ship or ships* to the goods lost.

If two policies on goods be made on the same voyage; the one on a particular ship, and the other in *ship or ships*; and the latter be lost, the latter policy shall be applied to the goods lost.

Thus:

(*a*) In the note of this case in 2 H. Bl. 345, the *Ganges* is here put for the *General Barker*, which is contrary to my note of the case, and obviously contrary to the fact.

Rowley v. *Ryan*, 2 H. Bl. 343.

Thus:—*Freeland* and *Rigby* at *St. Vincents*, wrote to the plaintiffs at *Liverpool* to get 1260 l. insured on 70 bales of cotton, *on board the Elizabeth*, from *Grenada* to *England*; and also 1300 l. on cotton which they intended to send by *some other ship* that would sail by the first convoy, and directed this to be insured by *ship or ships*.—The plaintiff accordingly got 1260 l. insured in *London*, on goods on board the *Elizabeth*; and also 1300 l. on goods on board *ship or ships*, viz. 700 l. at *Liverpool*, and 600 l. in *London*. The policy for 700 l. on which this action was brought, was, "At and from *Grenada* to *Liverpool*, "on any kind of goods as interest should appear, in "*ship or ships*, on account of *Freeland* and *Rigby*, war- "ranted to sail on or before the 1st of *August* 1793, and "return 8 *per cent.* if the ship sailed with convoy, and "arrived; without any exception of the goods on board "the *Elizabeth*." The policy for 600 l. effected in *London*, was also *on ship or ships*; at and from *Grenada* to *Liverpool*, but with an exception of 1260 l. "on 70 bales "of cotton *per Elizabeth*," the same underwriters in *London* having before subscribed the policy on the *Elizabeth*. But the plaintiffs did not communicate to the underwriters at *Liverpool*, the letter of *Freeland* and *Rigby*, directing an insurance on the *Elizabeth*, nor any circumstance respecting the goods shipped on board the *Elizabeth*, and the insurance made on that ship.—The *Elizabeth* arrived safe at *Liverpool*. The *Heart of Oak*, on board of which the second cargo was shipped, was totally lost in the voyage.—The defendant conceiving that he had a right to apply the policy for 700 l. *on ship or ships*, to the goods on board the *Elizabeth*, paid 8 *per cent.* into court on account of her having sailed with convoy and arrived. —The plaintiff recovered a verdict for the full amount of the defendant's subscription, including the money paid into court.—Upon a motion for a new trial, it was contended, on the part of the defendant, *first*, that a policy on *ship or ships* was not a legal policy; and *secondly*, that, as a ship answering the description in the policy, arrived safe, having the full amount of the sum insured, the property

property of *Freeland* and *Rigby*, on board, the policy was satisfied: And as every circumstance respecting the specific insurance on the *Elizabeth* had been concealed from the defendant, it was the same, with regard to him, as if no such insurance had been made on that ship. For if the *Elizabeth* had been lost, and the *Heart of Oak* had arrived safe, the policy might, by suppressing the letter from *Freeland* and *Rigby*, have charged the defendant with that loss. But the court were unanimously of opinion, *first*, that the legality of the policy on *ship or ships*, was too well established, both by usage and authority, to be disputed; and *secondly*, that the insured had clearly a right to apply, upon the authority of the foregoing case of *Henchman* v. *Offley*, such an insurance to whatever ship he thought proper within the terms of it.

By the law of *France*, if an insurance be made *separately* on goods on board several ships named, and the whole are laden on board one ship; the insurer will run only the risk on the sum which he had insured on board that one ship, although all the ships are lost; and he shall return the premium on all but that one, deducting one half *per cent.* (*a*)

If a certain sum be insured on goods on board *ship or ships*; and goods to a much larger amount be put on board several ships, of which some arrive safe, & the rest are lost; what proportion of the loss the insurers shall bear.

Emerigon (*b*) reports the following decision on this subject.—An insurance for 18,000 livres was made on goods on board the *Amphitrite*, from *Marseilles* to the *French West India Islands*; and from the *French West India Islands* to *Marseilles* or other ports in *France*, upon goods and merchandizes to be laden on board *any French ship or ships*. (*c*) —The *Amphitrite* arrived safe in the *West Indies*, where the captain loaded goods on board five different ships, in different quantities, to the amount of 25,892 livres. Three of the ships arrived safe, but the other two, with goods on board to the value of 15,259 livres, were taken by the *English*.—The insured insisted that the 18,000 livres insured should be considered as part of the 25,892 livres laden on board the five ships, and that the insurers should be condemned to pay the loss, by the rule of

(*a*) Vid. ord. mar. h. t. art. 32. *Valin* ib. *Pothier*, h. t. n. 68. *Le Guidon*, ch. 13. *Emerig.* tom. 1, p. 176.—(*b*) Tom. 1. p. 174.—(*c*) *In quovis*, dans un ou plusieurs bâtimens *Francois*, quels qu'ils puissent être.

of proportion, upon the total.—The inſurers inſiſted that the value of the goods which arrived ſafe was more than the ſum inſured; and therefore the policy was ſatisfied.—The inſured replied, that the goods on board the 5 ſhips formed one entire maſs, conſiſting of what was inſured, and what was not covered by the policy, and therefore the inſurers ſhould pay the loſs by the rule of proportion.—The inſurers were condemned to pay 54 *per cent.* on the ſum inſured; but upon what principle is not ſtated:—The proportion which 15,259 bear to 25,832 is nearly 59 *per cent.*: So that, if the rule inſiſted upon by the inſured was meant to be adopted by the court, there muſt have been a miſcalculation in fixing the loſs at 54 *per cent.*

If goods be inſured on board of ſeveral ſhips, by ſeparate policies, the riſk to begin from the goods leaving the ſhore, and the goods are all ſent in one veſſel to be put on board the ſeveral ſhips, & this veſſel be loſt; to what extent the inſurers are liable.

Le Guidon (*a*) puts this caſe.—A merchant intending to export a quantity of goods in ſeveral ſhips, makes an inſurance on each, and ſends the whole in a veſſel from *Rouen* to *Havre*, to be put on board the different ſhips, and this veſſel is loſt in its paſſage.—The queſtion he makes is, whether the words in the policy, "*courront riſque "en barques, heus, ou bateaux, qui porteront les dites marchandiſes à bord,*" ſhall bind the inſurers to pay the ſeveral ſums inſured on each ſhip.—He thinks the inſurers liable only for the greateſt ſum inſured on any of the ſhips.—*Valin* (*b*) is not of that opinion. "It is ſufficient," ſays he, "that it was intended to divide the goods amongſt the different ſhips, according to the terms of the inſurance, to make the loſs fall on the inſurers; for they muſt at length be carried on board each of the ſhips; and their being put on board a ſingle bark is of little conſequence."—*Emerigon* (*c*) on the contrary, thinks that it is of great conſequence to the inſurer, who has taken upon him the riſk of the goods on board ſeveral veſſels, that they ſhould not be confined to one; and that neither the inſured nor his captain has a right to make the condition of the inſurer more perilous, by uniting all the riſks into one, which, by the contract, ought to be divided. He concludes, however, by obſerving, that if ever the caſe ſhould happen, *Valin*'s opinion ought to be followed.

(*a*) Ch. 13, art. 1.—(*b*) Sur. art. 32, h. t. p. 79.—(*c*) Tom. 1, p. 177, 178.

Sect. 4.

Of the Conduct of the Ship.

ANOTHER implied condition relative to the ſhip is, that ſhe ſhall be navigated, conducted, and managed according to law; that is, not only according to the municipal law, and the law of nations, but alſo according to the particular treaties ſubſiſting between the country to which ſhe belongs and other ſtates. (*a*)

The ſhip muſt be conducted and navigated according to law.

The ſhip muſt, therefore, not only be engaged in a legal trade, but ſhe muſt carry it on in a legal manner. If the captain be under any legal diſability or diſqualification, the ſhip ſhall not be deemed to be navigated according to law; and an inſurance on ſuch ſhip will be void.

If the captain be under any legal diſability the inſurance will be void.

By the ſtatute for regulating the ſlave trade, (*b*) it is enacted "that it ſhall not be lawful for any perſon to become a maſter of any ſhip at the time ſhe ſhall clear out from any port of *Great Britain*, in the *African* ſlave trade, unleſs ſuch maſter ſhall make oath, and deliver in to the collector of the cuſtoms, at the port where ſuch ſhip ſhall clear out, a certificate atteſted *by the reſpective owner or owners*, that he has already ſerved in ſuch capacity during one voyage, or as chief mate or ſurgeon during two voyages, or as chief or other mate during three voyages, in the ſlave trade; upon pain that the maſter, and alſo the owners who employ him, ſhall, for every ſuch offence reſpectively, forfeit 500 l."

By 31 *G.* III c. 54, § 7. the maſter of every ſhip in the ſlave trade ſhall make oath and deliver to the collector of the port, a certificate, atteſted by the reſpective owner or owners, that he has already been maſter one voyage, or chief mate or ſurgeon two voyages, or any mate three voyages.

This certificate muſt be by the owners whom the maſter has *already ſerved*, and not by the owners of the ſhip in the *intended* voyage.

In compliance with this act, it is neceſſary in the ſlave trade, that the certificate of the captain's having ſerved as the act requires, ſhould be atteſted by the owner or owners

(*a*) Vid. Lord *Kenyon*'s judgment in *Chriſtie* v. *Secretan*, 8 T. R. 192 —(*b*) Stat. 31 *G.* III. c. 54, § 7, originally to be in force only for a year; but annually continued down to the preſent time.

owners of the ſhip or ſhips *in which ſuch ſervice was performed*; and the following caſe will ſhew that a certificate from the owners in the *intended voyage* will not be ſufficient evidence of a compliance with the directions of the act; and that, though a heavy penalty is impoſed, not only on the maſter who ſerves as ſuch without the qualification preſcribed, but alſo on the owners for employing him, and though the act does not declare the inſurance on a ſhip, having ſuch a maſter, void, yet the policy was declared void.

The maſter makes oath that he had been two voyages as chief mate, the owner in the *intended voyage* certifies that this is true: This is no evidence of a compliance with the act; and the evidence preſcribed by the act not being produced to ſhew that the ſhip was navigated according to law, the inſured cannot recover for a loſs occaſioned by an inſurrection of the ſlaves.

Farmer v. *Legg*, 7 T. R. 186.

An inſurance was made on the *Cadiz Diſpatch*, engaged in the *African* ſlave trade, "At and from *London* "to *Africa*, during her ſtay there, and from thence to "her port of diſcharge in the *Weſt Indies*."—In an action on this policy, it appeared that the loſs was occaſioned by an inſurrection of the ſlaves.—On the part of the defendant it was objected, that the ſhip had not been navigated in the manner preſcribed by the above act.—It appeared that the captain had made oath that he had been two voyages as chief mate of the *Sally*, in the ſlave trade; and the preſent plaintiff, *the owner in the voyage inſured*, had certified that this was true to the beſt of his knowledge and belief. But it was inſiſted that this was not admiſſible evidence, nor ſufficient proof of a compliance with the directions of the act, which was made to compel the owners of veſſels engaged in this traffic to employ experienced commanders, as one means of inſuring to the ſlaves a more judicious and humane treatment during their paſſage to the *Weſt Indies*: That the ſtatute, by directing the oath and certificate therein mentioned to be depoſited in the hands of the collector of the cuſtoms, had preſcribed the ſpecies of evidence by which alone a compliance with its regulations could be proved, and that the certificate required by the act was a certificate by the reſpective owner or owners during the *former voyages*, and not, as in the preſent caſe, by the owner in the intended voyage.—Lord *Kenyon*, before whom the cauſe was tried, being of opinion that

that the certificate did not anſwer the requiſition of the ſtatute, nonſuited the plaintiff.—A motion being made to ſet aſide this nonſuit and grant a new trial, on the ground of a miſconſtruction of the act of parliament, the court were unanimouſly of opinion that the certificate ought to have been from the owners of the ſhips in which the qualification was obtained, who muſt be beſt acquainted with the fact, and capable of certifying from their own knowledge.

The ſentence of a foreign court of admiralty condemning a ſhip as prize upon the expreſs ground that ſhe had violated a treaty ſubſiſting between the country to which ſhe belonged, and the belligerent by which ſhe is condemned, is concluſive evidence to prove that ſhe had not ſailed according to law, and ſo to diſcharge the underwriters. But the following deciſion will ſhew that if a neutral ſhip be condemned, *as being enemy's property*, and one of the reaſons aſſigned for this in the ſentence is, that ſhe had not the proper documents required by treaty on board; this ſhall not be concluſive evidence to prove that the ſhip had not ſailed according to law; for the only point which the ſentence profeſſes to *decide* is, that the ſhip was enemy's property.

An inſurance was made on goods on board the *Peggy*, on a voyage "From *Maryland* and *Virginia*, both or either, "to *Bremen*."—The policy was ſubſcribed on the 31ſt of May 1797, and on the ſecond of *June* following, the underwriters ſubſcribed a memorandum, written on the policy, in theſe words,—"The deſtination of the *Peggy* having been altered, we agree to ſtand our reſpective riſks in the goods inſured on this policy *per The Mercury*, direct from *Virginia* to *Bremen*."—An action was brought on the policy for a total loſs of the goods on board the *Mercury*, and for expenſes incurred in a ſuit by the plaintiff for the recovery of the property inſured.—On the trial of the cauſe it appeared, that the *Mercury* was, in fact, an *American* ſhip, and had on board, at the time of her capture, all ſuch papers and documents as are uſually carried on board of *American* ſhips, or which the *French*

Though a ſentence of condemnation, on the expreſs ground that the ſhip had violated a treaty, be concluſive to ſhew that ſhe did not ſail according to law; yet, if this be only *recited as a fact*, & the ground of the ſentence be that the ſhip was *enemy's property*, the ſentence will not be concluſive.

An *American* ſhip is captured by the *French*, and condemned as prize becauſe ſhe was *looked upon as belonging to the enemy*. Among other reaſons ſtated in the ſentence from which this concluſion is drawn, it is recited as a fact, that the ſhip had not all the papers required by the treaty between *France* and *America*. The ground of this ſentence being that the ſhip and cargo were *enemy's property*, it is not concluſive

evidence to prove that the ſhip had acted in contravention of the treaty.

Chriſtie v. *Secretan*, 8 T. R. 192. ſup. 300.

French themſelves deemed neceſſary in former voyages. There was alſo a muſter-roll on board, but not ſigned or certified by any public officer of the place from which the ſhip ſailed.—No warranty was made to any of the underwriters on the ſubject: On the contrary, the broker, though he ſpoke of the ſhip as an *American*, told the underwriters that he was directed not to warrant any thing.—On the 20th of *May* 1797, the ſhip ſailed with the goods on board from *Virginia* on the voyage inſured, and on the 22d of *June* following was captured by a *French* privateer, and taken into *Nantz*.—The proceedings being inſtituted before the commercial tribunal there, the following ſentence was pronounced by that court.—"Conſidering that the 4th article of the decree of the 3d *Brûmaire*, 4th year, declares good prize, All *American* ſhips *which ſhall not have on board a muſter-roll in due form, ſuch as is preſcribed by the form annexed to the treaty of the 6th of February* 1778; and that the muſter-roll of the ſhip *Mercury* is not conformable to that form, or to that ordered by the decree of the *Directory* of the 12th *Ventoſe*, 4th year, it being neither dated or ſigned by any public officer of the *United States*: Conſidering that the bill of lading of 255 hogſheads of tobacco found on board, was not ſigned by the captain, is contrary to the 9th article of the marine ordinances, whereby it is declared, that all veſſels on board whereof no charter-party, bills of lading, or invoices, are found, ſhall be decreed good prize, together with their cargoes, as alſo the 9th regulation of the 21ſt of *October* 1744, declaring all bills of lading not ſigned null and void: Conſidering that there were other goods on board of which there were no bills of lading or invoice; that the captain has produced no *American* protection, and that it appears that he is an *Iriſhman*, and has a wife and children in *Ireland*—the tribunal, in conformity with the above laws, adjudges and declares the validity of the prize of the ſhip *Mercury*, and of the goods and effects on board, for want of the diſpatches and ſea papers of the captain being in regular order; *on which account*

count ſhe is looked upon as belonging to the enemies of the French *republic;* the ſame being agreeable to the 7th article of the marine ordinances of 1681."—Upon this caſe it was inſiſted on the part of the defendant, that though there was no warranty that the ſhip was *American*, yet, being in fact *American*, ſhe ought to have had all thoſe documents which are neceſſary for the protection of an *American* ſhip, whether required by the law of nations, or particular treaties, the want of which ſubjected her to additional riſks, there being a warranty implied in every contract of inſurance, *that the ſhip ſhall be navigated according to the laws of the country to which ſhe belongs and to which ſhe is going.* (*a*)—But the court determined that the plaintiff was entitled to recover.—Lord *Kenyon* ſaid, —"In deciding this caſe I do not mean to deny that the ſhip inſured muſt be navigated, not only according to the law of nations, but alſo according to the particular treaties ſubſiſting between the country to which ſhe belongs and other countries.—In general there can be no doubt but that the ſentence of a court of admiralty is concluſive, *as to the points which it profeſſes to decide.* It was ſo ruled in *Hughes* v. *Cornelius*, (*b*) and that has been acknowledged to be law ever ſince. But the ſentence of ſuch a court *is only concluſive* on the points which it profeſſes to decide; and the only queſtion in this caſe is, what point the *French* court of admiralty has decided. Now the ſentence recites many facts into which it is not neceſſary to inquire; (*c*) but the ſole reaſon given for the adjudication, at the concluding part, does not affect the caſe before us. If the ſhip and cargo had been condemned for having violated any treaty between *France* and *America*,

A ſhip inſured muſt be navigated not only according to the law of nations, but alſo according to the particular treaties ſubſiſting between the country to which ſhe belongs, and other countries.

(*a*) The authorities cited in ſupport of this propoſition were the caſe of *Law* v. *Hollingworth*, 7 T. R. 160, ſup. 373, and *Farmer* v. *Legg*, 7 T.R. 186. ſup. 386.—(*b*) 2 *Show.* 232.—(*c*) The adjudication muſt be ſuppoſed to be the neceſſary conſequence reſulting from the facts found; and the facts recited in the ſentence muſt have been found by the court, otherwiſe the ſentence of condemnation would have been without foundation.

America, we ſhould not have been able to extricate ourſelves from the effect of ſuch a ſentence. But the ſhort ground on which I proceed in this caſe is, that the condemnation is expreſſed, at the concluſion of it, to be, becauſe "the ſhip belonged to the enemies of the *French* "republic." (*a*) We cannot now inquire whether *France* and *America* were at enmity with each other. The foundation of the ſentence is that the ſhip belonged to the enemies of the *French* republic, and not becauſe the ſhip had not the proper documents on board. Mr. Juſtice *Groſe* ſaid,—"I agree that it was neceſſary for this ſhip to have on board all thoſe documents that an *American* ſhip ought to have; and that the want of them would have diſcharged the underwriter. Now the ſentence does not proceed on the want of any ſuch documents, but on the expreſs ground that the ſhip belonged to the enemies of the *French* republic. We can only look to the foundation of the ſentence, and not to the previous reaſons there ſtated."—Mr. Juſtice *Lawrence* ſaid,—"In the courſe of the argument, many things, I think, were taken for granted, to which I cannot aſſent. Among others, it was ſaid, that the ſhip inſured muſt be navigated according to the laws of the countries from and to which ſhe ſails: But that propoſition, I rather think is not ſupported, in its extent, by the caſes. It is true that if the inſured bring an action here on a policy of inſurance, effected contrary to the law of this country, he cannot recover: But I do not know that the caſes have gone the length of deciding that no action can be maintained here on a policy made contrary to the revenue laws of another country. (*b*) I doubt alſo whether there be any analogy between

Whether the ſhip inſured muſt be navigated according to the laws, both of the country to which ſhe belongs, and of that to which ſhe is bound.

(*a*) The words of the ſentence, as tranſlated in the report, are; "On which account ſhe is *looked upon* as belonging to the enemies of the *French* republic."—(*b*) The caſes of *Holman* v. *Johnſon*, *Coup.* 341, and *Biggs* v. *Lawrence*, 3 T. R. 454, ſhew that a contract is not deemed void by the law of *England*, merely becauſe it is made in contravention of the revenue laws of a foreign ſtate; and in the caſe of *Lever* v. *Fletcher*, ſup. 54[illegible]

Lord

between a caſe like the preſent and caſes where there is an implied warranty of ſea-worthineſs. The latter is implied from the nature of the contract. But that is not the caſe of a ſhip wanting the proper documents on board. She may, nevertheleſs, perform her voyage; at leaſt there is no certainty that ſhe will not, as there is in the other caſes alluded to. I have merely thrown out theſe doubts in conſequence of what fell from the counſel in the argument, without meaning to give any deciſive opinion upon theſe points. It has been contended, however, on the part of the defendant, that the ſhip in queſtion was condemned for not having on board thoſe papers that are required by the treaty between *France* and *America*; and if that had been the expreſs ground of the ſentence, I ſhould have found great difficulty in reſiſting its effect, as applied to this action: But that is not the ground of their deciſion. They have ſtated, indeed, many things that induced them to draw the concluſion *that ſhe was the property of an enemy*; but that is the ground of the ſentence. We muſt conſider the ſentence as concluſive on that point, without examining the premiſes that led to that concluſion."

Lord *Mansfield* ſays, that no country pays attention to the revenue laws of another; and he lays it down as law, that if an inſurer enter into the contract, with full knowledge that the inſurance is meant to protect a ſmuggling trade with a foreign country, then it is a fair contract as between the parties.—See ch. 3, § 1, where this ſubject is fully conſidered.

CHAP. XII.

Of Deviation.

BY deviation is here meant a voluntary departure, without any neceſſity, from the uſual courſe of the voyage inſured. From the moment this happens, the voyage is changed, the contract is determined, and the inſurer is diſcharged from all ſubſequent reſponſibility. By the terms of the contract, the inſurer only runs the riſk of the voyage agreed upon, and of no other; and it is therefore a condition neceſſarily implied in the policy, that the ſhip ſhall proceed by the ſhorteſt and ſafeſt courſe to her port of deſtination, and on no account to deviate from that courſe, but in caſes of neceſſity. (*a*)

We will conſider the ſubject of deviation under the two following heads;

1. What ſhall amount to a deviation that will diſcharge the inſurers;

2. What are the caſes of neceſſity that will juſtify a deviation.

Sect. 1.

What ſhall amount to a Deviation that will diſcharge the Inſurers.

The courſe of the voyage does not mean the neareſt poſſible way, but the uſual and regular courſe. Stopping at certain places in the voyage, is no deviation, if it be cuſtomary to do ſo.

BY the courſe of the voyage is not meant *the ſhorteſt poſſible way* from the port of departure to the port of deſtination; but the regular and cuſtomary track, if ſuch there be, which long uſage has proved be the ſafeſt and moſt convenient. And therefore the ſtopping at certain places in the courſe of a voyage, though out of the direct line, is not a deviation, but a part of the voyage, if it has been the uſual and ſettled practice, to ſtop

(*a*) Periculum intelligitur ſolum currere aſſecurator, pro illo itinere convento, et non pro alio. Nam ſi navis mutaverit iter, vel a viâ rectâ illius itineris diverterit, non tenetur amplices aſſecurator. *Roccus*, n. 52. Vid. *Emerig.* tom. 2, p. 5. *Doug.* 278.

ſtop at thoſe places. For whatever is uſually done, is preſumed to be foreſeen, and to be in the contemplation of the parties, and is therefore underſtood to be referred to by every policy, and to make a part of it as much as if it were expreſſed. (*a*)

But evidence of a few inſtances will not be ſufficient to eſtabliſh ſuch an uſage. It can only be ſupported by long and regular practice. And therefore, if a ſhip, in a voyage from *Liverpool* to *Jamaica*, put into the *Iſle of Man*; and ſome inſtances appear of ſhips, in this voyage, putting in there; but no regular or ſettled practice to do ſo appear: This will not excuſe the deviation; but the inſurers will be diſcharged. (*b*)

But a few inſtances will not make ſuch an uſage.

The effect of a deviation is not to *vitiate or avoid* the policy, but only to determine it from the time of the deviation, and to diſcharge the inſurer from all ſubſequent reſponſibility. If, therefore, a ſhip, after her departure, receive damage, then deviate, and is afterwards loſt; though the inſurer is diſcharged from the time of the deviation, and is not anſwerable for the ſubſequent loſs; yet he is anſwerable for the damage received before the deviation. (*c*) But though he is thus diſcharged from ſubſequent reſponſibility, yet he is entitled to retain the whole premium.

Effect of a deviation.

A perſon unacquainted with the nature of this contract, might, at firſt view, be tempted to think that if, after a deviation, the ſhip reſume her proper courſe, ſtill being in good condition, and capable of performing the voyage, ſuch a deviation ought not to alter the rights of the parties, or deprive the inſured of the benefit of the policy.—But the anſwer is, that the condition implied in the contract, that the ſhip ſhall not deviate without neceſſity, being broken by the inſured, the inſurer is diſcharged. The proper courſe of the voyage being once interrupted, cannot

It determines the contract, though the ſhip reſume her proper courſe, and in a condition to complete the voyage.

(*a*) Per Lord *Mansfield*, in *Pelly* v. *Roy. Ex. Aſſ.* 1 *Bur.* 348, ſup. 182.—(*b*) Vid. *Bond* v. *Nutt*, *Cowp.* 601, ſup. 255.—(*c*) Per *Holt*, C. J. *Green* v. *Young*, at N. P. 2 Lord *Ray.* 840. 2 *Salk.* 444.

cannot be reſumed in the eyes of the law. The contract being once diſſolved, cannot be renewed without the conſent of both parties; and if a loſs happen after a deviation, who can ſay that the ſhip would not have arrived ſafe if ſhe had purſued the uſual courſe?

The ſmallneſs of a deviation makes it not the leſs fatal.

The ſhortneſs of the time, or of the diſtance, of a deviation, makes no difference as to its effect on the contract. Whether it be for one hour, or a month; or for one mile or one hundred, the conſequence is the ſame. If it be voluntary, and without neceſſity, it puts an end to the reſponſibility of the inſurer. The true reaſon why a deviation diſcharges the inſurer is, not the increaſe of the riſk, but, that the party contracting has voluntarily ſubſtituted another voyage for that which was inſured. (*a*)

A ſhip puts into a port not in the uſual courſe of the voyage, though it lies in her way. This is a deviation.

Therefore, where an inſurance was made on a veſſel "from *Dartmouth* to *Liverpool*;" and the veſſel, in her paſſage from *Dartmouth*, put into *Loo*, a place ſhe muſt of neceſſity paſs by, in the courſe of the voyage inſured: Though no accident befel her in going into, or coming out of *Loo*, but ſhe was loſt after ſhe got out to ſea again; Mr. Juſtice *Yates* held that this was a deviation.

Fox v. *Black*, at N. P. 1767. *Beawes* 315.

So, where goods were inſured from *Dunkirk* to *Leghorn*; and the ſhip came to *Dover*, in her way to procure a *Mediterranean* paſs; and being afterwards loſt, Lord *Mansfield*, in an action on the policy, held that the calling at *Dover* was a deviation, which diſcharged the underwriters.

S. P. *Townſon* v. *Guyon*, at N. P. *Beawes* 315.

A ſhip having liberty to put into one port, puts into another equally in her way: This is a deviation, and fatal to the contract, though neither the riſk or the premium would have been greater if it had had been allowed by the policy.

So, where an inſurance was made at *Glaſgow* on fourteen hogſheads of tobacco, "beginning the adventure "from the loading thereof at *Carron*, and to continue "till the ſhip, *(being allowed a liberty to call at Leith,)* "ſhall arrive at *Hull*, and there be ſafely delivered." —The inſtructions of the inſured to the broker directed him to make the inſurance, "with liberty to call *as uſual*," and it was uſual for veſſels ſailing from *Carron*, with goods on freight, to *Hull*, in going down the *Frith* of *Forth*, to touch at different places, to take in or deliver goods; particularly at *Burrowſtowneſs*, and *Leith*, and at *Morriſon's*

Elliot v. *Wilſon*, 7 Bro Parl. Ca. 459.

(*a*) Vid. *Lavabre* v. *Wilſon*, ſup. 186.

ſon's Haven, ſix miles down the *Frith*, on the ſame ſide with *Leith*. The inſured were not privy to the allowance "*to call at Leith*," being ſubſtituted in the policy for the more general liberty, "*to call as uſual*." The premium was equal if not higher, than was uſual where the general liberty, to touch at the cuſtomary ports, was allowed. The ſhip ſailed on the 4th of *February* 1774, did not touch at *Leith*, *but put into Morriſon's Haven*, ſailed from thence on the 9th, got ſafe into the direct courſe from *Carron* to *Hull*, and proceeded with a fair wind, till the 10th, when ſhe was overtaken by a ſtorm, wrecked on the coaſt of *Northumberland*, and the cargo totally loſt.—The underwriters on hearing of the loſs, conceiving themſelves liable, wrote orders to have the tobacco preſerved and ſent to *Hull*, promiſing to contribute towards the expenſe as far as they were intereſted. Afterwards, however, they proteſted againſt the ſhip's having gone into *Morriſon's Haven*, as being a deviation, and refuſed payment of the loſs.—An action was brought by the inſured in *Scotland*, and, after a variety of proceedings in the courts there, which would neither be very intelligible, or very inſtructive, to an *Engliſh* reader, the underwriters were decreed to pay the amount of the loſs. But the Houſe of Lords, upon appeal, reverſed that judgment, being of opinion that a wilful deviation from the due courſe of the voyage inſured, is, in all caſes, a determination of the policy: And that it is immaterial from what cauſe, or at what place, a ſubſequent loſs happens; for, from that moment of the deviation the underwriters are diſcharged. That there was, in this caſe, a wilful deviation; and though ſhips ſailing on this voyage, have ſometimes been permitted, by the terms of the policies underwritten at the ſame premium, to go into *Morriſon's Haven*, yet that could not avail in the preſent caſe, ſince here no ſuch permiſſion was given.

If there be ſeveral ports of diſcharge mentioned in the policy, the ſhip muſt go to thoſe places in the order in which they are named, unleſs ſome uſage or particular facts appear to vary the general rule.

If there be ſeveral ports of diſcharge mentioned in the policy, the ſhip muſt go to them in their order.

Thus:

A ſhip is inſured from *A.* to *B.* and from thence to *C.* and *D.* the ports of diſcharge. The ſhip goes to *D.* before *C*: This is a deviation.

Beatſon v. *Haworth*, 6 T. R. 531.

Thus:—An inſurance was made on a ſhip, "At and "from *Fiſherow* to *Gothenburgh*, and back to *Leith*, and "*Cockenzie*;"—The ſhip performed her voyage outward to *Gothenburgh*, and having taken in goods both for *Leith* and *Cockenzie*, on her return home, without going to *Leith*, ſhe firſt put into *Cockenzie*, where ſhe was ſtranded and loſt.—In an action on the policy, evidence was given to ſhew, that *Leith* was a very ſafe and commodious harbour, and *Cockenzie* a very ſmall and inſecure one, eſpecially in the winter; that the two places are about ten miles from each other; but *Cockenzie* lies neareſt to *Gothenburgh*, and it is about a mile and a half out of the way to put into *Cockenzie*, in going from *Gothenburgh* to *Leith*; that, though there was no ſettled courſe to regulate this voyage, yet it was ſafeſt to go firſt to *Leith*; for, by diſcharging the lading for *Leith*, the riſk of going into *Cockenzie* was much leſſened.—Upon this caſe, the court determined, that as the intended voyage was deſcribed in the policy, and as there was no regular and ſettled courſe, known to all the traders, different from that ſo deſcribed, the ſhip deviated by putting into *Cockenzie* firſt, and conſequently that the plaintiff could not recover.—One of the judges added, that the parties, by inſerting the names of the places contrary to the natural order in which they lay in the ſhip's courſe, ſhewed it to be their *intention* to vary the natural courſe of the voyage.

Though the ports of diſcharge be not ſpecified, yet the ſhip muſt take them in their geographical order, as they occur.

And the following caſe will ſhew, that though the ſhip's ports of diſcharge are only mentioned generally, but not ſpecifically named in the policy, yet the ſhip muſt go to them in the geographical order in which they occur; and taking them out of that order, unleſs this be warranted by uſage, will be a deviation.

A ſhip is inſured from *London* to her ports of diſcharge in the *Streights*, with power in the voyage to ſtop at any places

An inſurance was made on goods, "At and from *Lon-* "*don* to the ſhip's ports of diſcharge in the *Streights* as "high as *Meſſina*; with power in the voyage to ſtop or "ſtay at any ports or places whatſoever."—The ſhip was freighted with lead from *London* to *Marſeilles*, and went into

into *Falmouth*, where ſhe ſtaid three weeks, and took in a freight of tin for the ſame place. Before ſhe went from *London*, the plaintiff, who was owner of the ſhip, declared that ſhe was to go directly to *Genoa*, *Leghorn*, and *Naples*, and there was nothing ſaid about *Marſeilles*. When ſhe was off *Marſeilles*, the wind was againſt her, and ſhe could not then get in, but went to *Genoa*, and from thence to *Leghorn*, and in coming back to *Marſeilles*, ſhe was attacked by a privateer, and blown up.—In an action on the policy, it was proved by ſeveral captains, and ſo held by Lord Chief Juſtice *Lee*, 1ſt, that the going into *Falmouth*, and ſtaying there was a deviation; 2dly, That as ſhe did not ſtop at *Marſeilles*, this was acting contrary to the terms of the policy; for by her ports of diſcharge muſt be underſtood, the ports at which it was intended goods ſhould be delivered, and the firſt of them was *Marſeilles*;—3dly, It was ſworn by ſeveral captains to be their opinion, (but the Chief Juſtice ſaid nothing on this point,) that the going no further in the *Streights* than *Leghorn*, and then returning, was a determination of the inſurance at *Leghorn*; and the inſurers diſcharged from the ſubſequent loſs. Upon this there was a verdict for the defendant.

whatſoever; and ſhe goes firſt to *Genoa*, then to *Legborn*, and laſtly to *Marſeilles*: The voyage ends at *Legborn*, and the inſurers are diſcharged.

Clayſon v. *Simmonds*, at N. P. cited by Mr. Juſtice *Lawrence*, 6 T. R. 533.

The following deciſion proceeded on the ſame principle.—A ſhip was inſured, "At and from *Liſbon* to a port in *England*, with liberty to call *at any one port in Portugal*, for any purpoſe whatſoever;" and the ſhip ſailed from *Liſbon* to *Faro*, to complete her loading; *Faro* being a port to the ſouthward of *Liſbon*, and therefore quite out of the courſe of the voyage to *England*.—In an action on the policy, Lord *Kenyon* was of opinion that the liberty given by the policy to call at any one port in *Portugal*, muſt be reſtrained to a permiſſion to call at ſome port to the northward of *Liſbon*, in the courſe of the voyage to *England*; and that going to the ſouthward was a deviation which diſcharged the underwriters.

A ſhip is inſured from *Liſbon* to *England*, with liberty to call *at any one port in Portugal*. This gives only a liberty to call at ſome port in *Portugal* in the courſe of the voyage to *England*.

Hegg v. *Horner*, at N. P. after Mich. 1797. MS.

Yet, if a ſhip be compelled by any neceſſity to change the order of the places to which ſhe is inſured, this is not a deviation.—As where a ſhip was inſured from *Liſbon* to *Madeira*, from thence to *Saffi*, on the coaſt of *Africa*,

Yet if a ſhip be compelled by *neceſſity* to alter the order of the places, this is no deviation.

Driſcol v. *Bovil*, 1 *Boſ.* & *Pul.* 313, ſup. 190.

Africa, and back from thence to *Liſbon*; and upon her arrival at *Madeira*, the crew being alarmed by reports of *Mooriſh* cruiſers being off *Saffi*, quitted the ſhip and refuſed to return to her unleſs the captain would promiſe to ſail immediately back to *Liſbon*. The captain complied; but on his arrival at *Liſbon*, the charterers inſiſted on his proceeding directly to *Saffi*; which he accordingly did, and was captured on his return from *Saffi* to *Liſbon*.—It was determined, that there was no deviation in this caſe, and that the underwriters were liable for the loſs.

The clauſe giving liberty to *touch, ſtay, trade*, &c. muſt always be interpreted as ſubordinate to the voyage inſured.

Clauſes are very frequently introduced into policies, giving liberty to the inſured *to touch, ſtay, trade, &c. at any ports or places*, in the courſe of the voyage; and as theſe clauſes are often inſerted as a matter of courſe, and without much conſideration by either party, it is neceſſary that they ſhould be underſtood with ſuch reſtrictions as the courts in different countries have thought neceſſary to be impoſed on them, in order to prevent any unfair advantage being taken of the general words in which they are uſually expreſſed. They are therefore always interpreted as ſubordinate to the voyage inſured, which is the principal object of the contract; and in caſes of doubt, they muſt be underſtood with reference to the laws of commerce and the uſage of the particular trade. If, therefore, there be in the policy a liberty *to touch, ſtay, and trade at any ports and places in the voyage*; ſuch a liberty, however general the words may be, does not give the captain a power to change the regular courſe of the voyage inſured, which he muſt keep conſtantly in view: It only extends to the ports and places in the uſual and ordinary courſe of the voyage. (*a*)

And however general they do not give the captain a power to *change the voyage*, but only to extend it to places in the uſual courſe of the voyage.

Thus:

(*a*) *Caſaregis*, (diſc. 67, n. 25.) obſerving that the captain in the exerciſe of this liberty ought never to loſe ſight of the voyage inſured, ſays, "Clarum eſt verba apodixiæ ſecuritatis committere voluntati patroni totum itineris decurſum; ita ut in ejus arbitrio regulato tamen à jure et ratione, repoſitum ſit quaſcumque ſcalas, quoſcumque portus ingredi, antecedere in viâ, et retrocedere pro ut exigunt neceſſitas et opportunitas, ſed ſemper

Thus:—An inſurance was made, "At and from *Port* "*L'Orient* to *Pondicherry*, *Madras*, and *China*; and at "and from thence back to the ſhip's port or ports of diſ- "charge in *France*; with liberty to touch in the *outward* "*or homeward bound voyage*, at the Iſles of *France* and "*Bourbon*, *and at all or any other place or places where-* "*ſoever*."—There was alſo a clauſe in the policy, "That "the ſhip in this voyage might *proceed to, and touch, and* "*ſtay, at any ports or places*, as well on this, as on the "other ſide, of the *Cape of Good Hope*, without its be- "ing deemed a deviation."—The ſhip arrived at *Pondi-cherry*, and, after remaining there a month, ſailed for *Bengal*, inſtead of going to *China*. Having wintered and undergone a repair there, ſhe returned to *Pondicherry*. Both in going and returning, ſhe touched at, and took in goods, or lay off, ſeveral places; and thus prolonged her voyage to and from *Bengal* much beyond the uſual time. Having taken in her homeward cargo at *Pondicherry*, ſhe proceeded on her voyage back to *L'Orient;* but was cap-tured by an *Engliſh* privateer.—In an action on this pol-icy, one queſtion was, whether the voyage to *Bengal* was inſured

A ſhip is inſur-ed from *France* to *Pondicherry* and *China*, and back to *France*, with liberty *to touch and ſtay at ports and places*, &c. This will not cover a voyage to *Ben-gal*.—A liberty to touch and ſtay at any ports and places means, ports and places *in the uſual courſe of the voyage.*

Lavabre v. *Wil-ſon* and *Lavabre* v. *Watſon*, *Doug.* 271.

ſemper animo, et intentione proſequendi viaggium uſque ad finem deſtinatam."—The ſame doctrine is laid down by *Emeri-gon*, (tom. 2, p. 32, and ſeq.) and he exemplifies it by the fol-lowing caſes.—1. An inſurance was made on a voyage from *Marſeilles* to the *Levant* and back, with liberty to the captain, "*de toucher et retrogader per tout ou il lui plairoit.*" The ſhip ſailed to *Cadiz*, where ſhe was loſt.—It was determined that the liberty given by the above clauſe was ſubordinate to the voyage mentioned in the policy; but that here the voyage was changed, and the inſurers diſcharged.—2. A voyage was inſured from *Leghorn* to *Havre de Grace*, with liberty "*de toucher par tout, avant, arriere, à droit et à gauche*, &c. The ſhip ſailed up the *Loire* to put into *Nantes*, and was loſt.—It was held that the inſurers were not anſwerable for the loſs, becauſe the above clauſe only gave liberty to touch at the uſual places in the courſe of the voyage inſured; but not to increaſe the riſk by going up the river beyond the place of deſtination.

inſured by the policy, under the general liberty to touch and ſtay *at any ports or places?*—Upon this point Lord *Mansfield*, who tried the cauſe, held clearly, that theſe general words were, by the expreſſions, "outward and homeward-bound voyages," and "in this voyage," qualified and reſtrained ſo as to mean only places *in the uſual courſe of the voyage* to and from the places mentioned in the policy. It was then alleged on the part of the plaintiff, that the voyage to *Bengal* was adopted by *neceſſity*, for the ſafety of the ſhip:—And to prove this, witneſſes were called to ſhew that the ſhip was ſo leaky at *Pondicherry*, that ſhe appeared to require careening, which could only be done at *Bengal*, that being the neareſt place to which ſhe could proceed with ſafety for that purpoſe: That though it turned out, when ſhe got to *Bengal*, that ſhe could be repaired without careening, yet this was only diſcovered after ſhe was unloaded of much more of her contents than could have been taken out of her in the open road of *Pondicherry*: That, beſides the neceſſity of repair, ſhe was delayed in unloading the outward cargo at *Pondicherry*, till it was too late to undertake the *China* voyage with ſafety; and *Bengal* was then the ſafeſt place to winter at.—The defence relied upon was, 1ſt, That the ſhip had never ſailed on the voyage inſured, her true and original deſtination having been *Bengal*, and not *China*. 2dly, That, ſuppoſing her to have ſailed on the voyage deſcribed in the policy, yet, her going from *Pondicherry* to *Bengal*, inſtead of proceeding to *China*, was a deviation, and not juſtified by neceſſity. In ſupport of the firſt ground of defence, ſecret inſtructions, found on board the ſhip, were relied upon, which, though obſcurely penned, gave room to ſuſpect either that before her departure, the *Bengal* voyage was ſubſtituted for that to *China*; or at leaſt that this alternative was left to the diſcretion of the ſupercargo, to be decided by events in *India*, which actually happened, ſo as to determine the voyage to *Bengal*.—On the ſecond ground, it was contended, that from the plaintiff's evidence it appeared that there was no neceſſity for going to *Bengal*; and that inſtead of going thither directly, a trading voyage had been made,

made, which afforded a ſtrong preſumption that trading, and not the leak, or lateneſs of the ſeaſon, was the object of going to *Bengal*: Several letters written by the owners alſo raiſed a preſumption that the neceſſity of going to *Bengal* was a pretence deviſed after the capture, when it was feared that the policy would not cover the voyage to that place.—Lord *Mansfield* ſummed up ſtrongly againſt the plaintiff on the ground of fraud. But independent of that, he ſaid that if neceſſity were admitted to have been the ſole motive for ſubſtituting the voyage to *Bengal* in the place of that to *China*, ſtill it was incumbent on the inſured to have purſued that voyage of neceſſity directly, in the ſhorteſt and moſt expeditious manner; and that the delay in going from *Pondicherry* to *Bengal*, and the repeated ſtops by touching at different places, and trading there, were deviations, and not within the protection which the ſuppoſed neceſſity afforded to the direct voyage to *Bengal*.—The jury, notwithſtanding this direction, found a verdict for the plaintiffs, which was afterwards ſet aſide, and a new trial granted, upon the following grounds: That a deviation from neceſſity muſt be juſtified both as to the ſubſtance and manner; and nothing more muſt be done than what the neceſſity requires:—That the true reaſon why a deviation diſcharges the inſurer, is not the increaſe of the riſk; but, that the party contracting has, without neceſſity, ſubſtituted another voyage for that which was inſured: That the neceſſity of the voyage to *Bengal* did not prove the neceſſity to trade; or to touch at a number of ports all out of the direct courſe, or to conſume ſix weeks or two months, inſtead of ſix days.—The plaintiffs afterwards ſubmitted to the opinion of the court, and abandoned their claim againſt the underwriters. (*a*)

The reaſon why a deviation diſcharges the inſurer.

Nothing

(*a*) *Emerigon* (tom. 2, p. 62,) has given a tranſlation of this caſe, to which he adds ſome remarks which have been already mentioned, ſup. 29. He adds, that having been conſulted on this caſe by *Lavabre*, *Doerner* and company, bankers at *Paris*, who had lent 180,000 livres on bottomry on the ſhip and cargo, and

A letter of marque is not at liberty to cruiſe in queſt of prizes. But ſhe may give chaſe to an enemy which comes in her way.

Nothing will juſtify a wilful deviation, but a real neceſſity to deviate; and therefore, if a letter of marque leave the convoy to which ſhe belongs, and cruiſe in queſt of prizes, though but for a ſingle night; this will be a fatal deviation. (*a*)

But though a ſhip cannot, without deviating, cruiſe in queſt of prizes, yet if an enemy come in the way of a ſhip having letters of marque, ſhe may give chaſe to the enemy, and in ſo doing, ſhall not be deemed to have deviated.

A letter of marque chaſes an enemy and then loſes ſight of her in the night, and in the morning engages her; this is no deviation.

Jolly v. *Walker*, at N. P. Eaſt. Vac. 1781. *Beawes*, 316.

Thus:—A ſhip, having letters of marque, was inſured, "At and from *London* to *Cork* and the *Weſt Indies*."—The ſhip in the night, deſcried a ſhip of the enemy, and after chaſing, loſt ſight of her for ſix hours, and till the morning, when they engaged. She did not take the enemy, but proceeded on her voyage and was afterwards captured: It was agreed on all hands, that though a ſhip, in ſuch circumſtances, could not *cruiſe*, yet it was admitted by the underwriters, that if an enemy *came in her way*, ſhe might engage, or defend herſelf, but they contended that, if ſhe loſt ſight of the enemy, it was no longer chaſing, but *cruiſing*.—Lord *Mansfield* left it upon the evidence to the jury, who found for the plaintiffs.

In the note of this caſe, which ſeems a very defective one, it is not ſtated whether the letter of marque, after ſhe loſt ſight of the enemy in the night, continued cruiſing for her till the morning, or reſumed her courſe to the *Weſt Indies*,

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and were the inſured in the *Engliſh* policy, he anſwered 1ſt, That *Berard* and company, the borrowers, having broke their contract, it was juſt that they ſhould ſuffer the loſs occaſioned by their contravention of it. 2dly, That, by changing the voyage, the lenders on bottomry, as well as the inſurers, were diſcharged from the perils of the ſea; and conſequently that *Lavabre*, *Doerner* and company were entitled to recover from *Berard* and company the 180,000 livres lent on bottomry, together with the marine intereſt and the intereſt incurred ſince the ſame became due.—(*a*) Per Lord *Camden*, C. J. in *Cock* v. *Townſon*, at N. P. *Beawes*, 316.

dits, and fell in with the enemy again by accident. Probably that was the queſtion left to the jury: If ſo, the inference will be that a *cruiſing* in hopes of meeting the enemy again, after ſhe had been loſt ſight of, would have been a deviation, though *chaſing* her was not.

A liberty to cruiſe for a certain time in the voyage is to be taken as one continued period.

Sometimes a policy on a ſhip of force, with letters of marque, contains a clauſe giving liberty to cruiſe for a certain term in the courſe of her voyage. The following caſe will ſhew, that if it be meant that this term ſhall conſiſt of different periods of time, taken ſeparately, it ought to be ſo expreſſed; otherwiſe the cruiſe will be taken to be for one continued period of time, and not for ſeveral periods amounting to that time.

A letter of marque is inſured for a voyage with liberty to cruiſe for ſix weeks, but no time mentioned for its commencement: The ſhip may cruiſe ſix *ſucceſſive* weeks, but not at different times.

A letter of marque was inſured, "At and from *Liverpool* "to *Antigua*, with liberty to cruiſe for ſix weeks, and to "return to *Ireland*, or *Falmouth*, or *Milford*, with any prize "or prizes."—This policy was made on the 9th of *February* 1779, and there was no time fixed in it for the commencement, or duration, of the voyage. The ſhip, in fact, ſailed from *Liverpool* on the 28th of *February*, and kept on her direct courſe till the 14th of *March*, chaſing, however, at different times, from the 7th to the 14th, when ſhe began to cruiſe, the captain giving notice thereof to the crew, and ordering a minute of it to be made in the log-book. She continued to cruiſe about the ſame latitude, till the 18th of *April*, and then diſcontinued it, and the captain again gave notice, intending to go to the *Burlings* off *Liſbon*, in the courſe of the voyage. On the 23d, ſhe renewed the cruiſe, of which the captain gave notice as before, and continued it till the 28th, when ſhe was taken by an *American* privateer.—An action was brought on the policy, and, upon the trial, the captain ſwore that before he ſailed, the policy broker, (whom he conſidered as acting for both parties,) told him that he might cruiſe in any latitude, and at different times, mentioning in his log-book, when he ſhould begin and end; and if the amount of the different times, when added together, ſhould not exceed the ſix weeks, the terms of the inſurance would be complied with.—Witneſſes were called on the part of the defendant, who concurred

Syers v. *Bridge*, *Doug.* 509.

curred in thinking that, by the terms of the policy, the cruiſe ought to have been for ſix ſucceſſive weeks; not interruptedly and at intervals.—On the other ſide, witneſſes were examined, who thought, on the contrary, that the policy did not import any ſuch reſtriction. But this was admitted, on both ſides, to be only matter of *opinion*.—A verdict was found for the plaintiff, with liberty to the defendant to move for a new trial.—Upon that motion, the court determined that the liberty to cruiſe for ſix weeks, meant ſix *ſucceſſive* weeks from the commencement of the cruiſe, and therefore, that cruiſing *at different times* was a deviation which diſcharged the underwriters.—Lord *Mansfield* ſaid;—"This was merely a queſtion of conſtruction, on the face of the policy; and, unleſs an uſage could have been ſhewn in favour of this deſultory cruiſing, calling witneſſes to ſupport it, was calling them to mere *opinion*. None of thoſe produced knew of any *inſtance*, and therefore their evidence ought not to have been received: Yet, I dare ſay, their teſtimony had great weight with the jury. The meaning of words depends on the ſubject. The inſtructions were not read; but they ſhew the meaning very clearly, for they run thus: "To cruiſe ſix weeks, and *then* proceed "to *Antigua*." There can be no general rule. Here the ſubject matter, in my opinion, is deciſive to ſhew that the ſix weeks meant one continued period of time. There are frequently articles for a month's cruiſe, a ſix weeks' cruiſe, &c. Such a liberty, as in this caſe, to a letter of marque, is an excuſe for a deviation. But what is contended for by the plaintiffs is impoſſible in practice. Suppoſe the ſhip returns *directly back*, after cruiſing for the ſpace of a week. She may then, perhaps, take three weeks to return to where ſhe had been. Can ſhe then renew the cruiſe, and return again, and ſo repeatedly? The voyage, in that way, might laſt for years. But the true meaning is, "I will excuſe a deviation for "ſix weeks." Six weeks is a continuation, a congregate denomination of time. If they had meant ſeparate days, they would have ſaid 42 days."

Witneſſes may prove an uſage as explanatory of a clauſe in a policy; but their opinion of its *meaning* is not admiſſible evidence.

One

The ſhip muſt perform the voyage within a reaſonable time, and any unneceſſary delay will amount to a deviation.

One reaſon why it is a condition implied in the contract that the ſhip ſhall not deviate, is, that, by departing from the direct courſe of the voyage, the riſk is neceſſarily prolonged. The ſhip muſt, therefore, proceed on her voyage, not only by the ſhorteſt and ſafeſt courſe, but alſo with all reaſonable expedition; and in the following caſe it was determined, that any unneceſſary delay will be equivalent to a deviation.

A ſhip inſured on a trading voyage on the coaſt of *Africa*, ſtays there beyond the uſual time, as a receiving ſhip for ſlaves; this is equivalent to a deviation.

A ſhip was inſured, "At and from the coaſt of *Africa* "to the *Weſt Indies*, with liberty to exchange goods and "ſlaves."—It appeared that the ſhip ſtayed on the coaſt from *Auguſt* till *March*, and was employed in receiving ſlaves on board, the produce of the cargoes of other ſhips, which were afterwards put on board thoſe ſhips and ſent to the *Weſt Indies*; that this is the employment of what is called a *factory-ſhip*, but a regular factory ſhip is thatched and covered, and receives the ſlaves till a ſufficient number be collected to ſend away; but it does not appear that any ſlaves, the produce of the ſhip's own cargo, were ſent away in other veſſels, though her ſtay on the coaſt was ſeveral months beyond the uſual ſtay of ſhips in that trade.—The court decided that this was equivalent to a deviation.—Lord *Mansfield* ſaid,—"The ſingle point here is, whether there has not been what is equivalent to a deviation; whether the riſk has not been varied. No matter whether the riſk has or has not been thereby increaſed. If a ſhip inſured for a trading voyage be turned into a floating warehouſe, or a factory ſhip, the riſk is different. It varies the ſtay; for while ſhe is uſed as a warehouſe, no cargo can be bought for her. This is the law. The fact is, that, though this was not a regular *thatched* factory ſhip, yet ſhe was uſed as a thatched factory ſhip is uſed. This being clear, it follows that the riſk is different in point of length, from that which is generally underſtood in the trade, and conſequently from that which was inſured. (*a*)

Hartly v. *Buggin*, B. R. M. 22 *G.* III. MS. S. C. *Park*, 313.

A deviation is not the leſs fatal becauſe the riſk is not increaſed by it.

A deviation

(*a*) Vid. *Parkinſon* v. *Collier*, ſup. 169, in which Lord *Kenyon* lays down the ſame doctrine.

Diſtinction between an intended deviation and a different voyage.

A deviation from the voyage inſured is generally the reſult of after-thoughts, after-intereſt, after-temptation; and not of any previous deliberate intention. For it is not eaſy to conceive that any man, at all converſant in buſineſs, would be ſo fooliſh as to intend *before-hand*, to deviate from the voyage deſcribed in the policy; becauſe that would be paying for an indemnity, without having it. When the inſured intends a deviation from the direct courſe of the voyage inſured, it is always provided for, and the policy adapted to it, unleſs fraud be intended. In all caſes of deviation, the *termini à quo* and *ad quem* are the ſame. But where the voyage deſcribed in the policy is not the voyage intended, and the inſured, meaning to ſend the ſhip on a different voyage, gives the captain his inſtructions accordingly; this is not the caſe of an *intended deviation*; for there cannot be a deviation from a voyage which was never in the contemplation of the parties; but the caſe of a different voyage from that mentioned in the policy. (*a*)

Whether a deviation intended but not begun will diſcharge the inſurer.

It has generally been underſtood, that a deviation merely *intended*, but never begun, will not diſcharge the inſurer; (*b*) and two caſes are uſually cited in ſupport of this doctrine.

Foſter v. *Wilmer*, 2 *Str.* 1249.

The firſt was an inſurance, "From *Carolina* to *Liſbon*, "and at and from thence to *Briſtol*."—It appeared that the captain had taken in ſalt, which he was to deliver at *Falmouth*, before he went to *Briſtol*, but the ſhip was taken

(*a*) See the opinions of Lord *Mansfield*, and Mr. Juſtice *Buller*, in *Wooldridge* v. *Boydell*, *Doug.* 18, ſup. 229; and the opinion of Lord *Kenyon* in *Stott* v. *Vaughan*, ſup. 232. See however, *Kewley* v. *Ryan*, 2 H. *Bl.* 343, ſup. 231.—(*b*) *Roccus* (not. 20) ſays that the voyage is changed as ſoon as the captain begins, or even *agrees for* another voyage. "*Si caperit ſecundum viaggium licet non completum, vel convenerit aſportare alias merces in alium locum.*"—*Emerigon* (tom. 2, p. 56.) denies this latter opinion, and holds that if the captain give up his new project, and proceed on the voyage inſured, the inſurers continue liable. *Caſaregis*, (diſc. 67, n. 24,) ſays, "*Mutari viaggium tunc dicitur, quando primam principalem deſtinationem magiſter navis non ſequitur ut pote quod navis cum onere, et cum primis vecturis, ad locum deſtinatum amplius non intendit ire, nec eat.*

taken in the direct road to both places, and before ſhe came to the point where ſhe would have turned off to *Falmouth*.—It was ruled by Lord C. J. *Lee*, that the inſurer was liable; for it was but an *intention* to deviate; which was not ſufficient to diſcharge the underwriter.

The other was the caſe of an inſurance, "From *Hondu-* "*ras* to *London*;" and it appeared that there was a conſignment of goods to *Amſterdam*. A loſs happened before the ſhip came to the dividing point between the two voyages. This the inſurer was held bound to pay for.

Carter v. *Roy. Ex. Aſſ.* 2 *Str.* 1249.

Theſe two caſes ſeem to have been decided on the ground that a mere *intention* to deviate does not amount to a deviation: But it is proper to obſerve, that theſe are only *niſi prius* deciſions, and that in each of the caſes, particularly in the laſt, the voyage originally intended appears to have been different from the voyage inſured; and therefore it would ſeem that in each, as the law now ſtands, the contract would be held void, upon the ground of fraud, and the voyage being falſely deſcribed in the policy. (*a*)

From a certain point in a voyage there are ſeveral tracks to the place of deſtination, with certain advantages and diſadvantages belonging to each, and the captain has always been allowed, when he arrived at the dividing point, to elect, according to circumſtances, which of theſe tracks he will purſue. One of theſe tracks is preſcribed to him by the inſured, and this is not ſtated in the policy, nor even diſcloſed to the underwriters; and the ſhip, having taken the courſe preſcribed, is captured. —It was determined that, under theſe circumſtances, the inſured could not recover for this loſs.—Lord *Kenyon*, Mr. Juſtice *Aſhurſt*, and Mr. Juſtice *Groſe*, founded their opinion on the want of a full diſcloſure of the particular courſe the ſhip was to take, as being a circumſtance that might materially have varied the riſk; and this, whether it were conſidered as a concealment, or a defective deſcription

If there be ſeveral tracks to the place of deſtination, of which the captain ought to be at liberty, when he is at the dividing point, to elect one; but the inſured preſcribe one to him, the inſurer is diſcharged. Whether this ought to be conſidered as a deviation or a different voyage originally intended.

Middlewood v. *Blakes*. 7 T. R. 162, ſup. 232.

(*a*) Vid. *Hodgſon* v. *Richardſon*, ſup. 228; *Murdock* v. *Potts*, ſup. 230; *Wooldridge* v. *Boydell*, ſup. 229; *Stott* v. *Vaughan*, ſup. 232; *Kewley* v. *Ryan*, ſup. 231.

deſcription of the voyage in the policy, avoided the contract *ab initio*. Mr. Juſtice *Lawrence* founded his opinion on the ground that this was a *deviation*; and that if the ſhip had been captured before ſhe came to the dividing point, the plaintiff would have been entitled to recover, as the captain's *intention* to deviate did not, before he came to the dividing point, ſubject the underwriters to any additional riſk. (*a*)

Sect. 2.

What are the Caſes of Neceſſity that will juſtify a Deviation.

If the maſter act *bonâ fide*, and only aim at performing the voyage in the ſhorteſt and ſafeſt manner, a departure from the direct courſe will be no deviation.

A DEVIATION that will diſcharge the inſurer, muſt be a voluntary departure from the uſual courſe of the voyage inſured, and not warranted by any neceſſity. If a deviation can be juſtified by neceſſity, the inſurer will ſtill remain liable. One general principle pervades all the caſes on this point; namely, that if the captain, in departing from the uſual courſe of the voyage, acts fairly and *bonâ fide*, and according to the beſt of his judgment, for the benefit of all parties concerned, and has no other view but to conduct the ſhip and cargo, by the ſafeſt and ſhorteſt courſe to her port of deſtination; what he does is within the ſpirit of the contract, and the voyage will ſtill be protected by it. It is no deviation to go out of the way to avoid danger. In all caſes, therefore, in order to determine whether a departure from the direct courſe of the voyage inſured amounts to a deviation that will diſcharge the inſurer, it will be proper to attend to the motives, end, and conſequences of the act, as the true criterion of judgment. (*b*)

(*a*) Vid. the opinions of the judges on this caſe fully ſtated, ſup. 235.—(*b*) Per Lord *Mansfield* in *Enderby* v. *Fletcher*, at N. P. Trin. Vac. 1780. Vid. *Pelly* v. *Roy. Ex. Aſſur.* 1 *Bur.* 347, ſup. 181.

The cauſes which juſtify a deviation.

The caſes of neceſſity which are moſt frequently adduced to juſtify a departure from the direct courſe of the voyage inſured, are ſtreſs of weather, want of neceſſary repair, joining convoy, eſcaping from or avoiding an enemy, and mutiny of the crew. Theſe we will conſider ſeparately.

Streſs of weather.

And *firſt*, of *ſtreſs of weather*.—If a ſhip be driven by a ſtorm into any port out of the courſe of the voyage, ſhe is not obliged to return back to the point from whence ſhe was driven, but may make the beſt of her way to her port of deſtination; and this ſhall not be deemed a deviation. For what is occaſioned by the act of God ſhall be imputed to no man as a fault.

A ſhip, inſured from *St. Kitts* to *London*, is driven by a ſtorm out of the port of *St. Kitts* to *St. Euſtatia*, and being unable to return, completes her cargo there, and proceeds on her voyage: This deviation will not diſcharge the inſurers.

Delany v. *Stoddart*, 1 T. R. 22.

Thus, where the plaintiff, a merchant in the *Weſt Indies*, wrote to the defendant who was his correſpondent in *London*, deſiring him to get an inſurance effected on the ſhip *Friendſhip*, "At and from *St. Kitts* to *London*, "warranted to ſail with convoy."—The defendant neglecting to make this inſurance according to the order, and the ſhip being loſt, the plaintiff brought an action on the caſe againſt the defendant to recover the loſs. On the trial of the cauſe it appeared that the ſhip left the port of *St. Kitts* to take in her cargo, and let go an anchor at *Sandy Point*; but as the wind blew freſh, ſhe drove out, and could not come in again, but was obliged to go to *St. Euſtatia*: That ſhe ſailed from thence with the convoy, and afterwards foundered at ſea: That *St. Euſtatia* is in the direct line from *St. Kitts* to *London*; and the convoy from *St. Kitts* always looked into *St. Euſtatia*, to take up any ſhips that might be there: That when the ſhip was driven to *St. Euſtatia*, after making ſeveral unſucceſsful efforts to get back to *St. Kitts* to finiſh her loading, ſhe took the reſt of her loading at *St. Euſtatia*.—The principal queſtion was, whether there had been a deviation.(*a*) —The court determined that there was no deviation.—Lord *Mansfield* ſaid,—"The only queſtion is, whether this

(*a*) In this action the defendant has a right to make every objection to the plaintiff's recovering which an underwriter might have made in an action on the policy, had one been regularly effected. Vid. ſup. 209.

this be the ſame voyage as that intended to be inſured. If a ſtorm drive a ſhip into any port out of the courſe of her voyage, and being there, ſhe does the beſt ſhe can to get to her port of deſtination, ſhe is not obliged to return back to the point from whence ſhe was driven: Here the ſhip tried to go back to *St. Kitts*, but could not; and it is a much eaſier navigation to go directly from *St. Euſtatia* to *London*, than to go back to *St. Kitts* firſt. She loſt no time in taking in her cargo at *St. Euſtatia*. Every thing ſhould be imputed to the ſtorm, which was in reality done and occaſioned by it. It was a queſtion to be left to a jury, whether this was the ſame voyage or not; and they have determined it.—Mr. Juſtice *Aſhurſt* and Mr. Juſtice *Buller* concurred in this opinion, and laid much ſtreſs on the circumſtance of the riſk being diminiſhed by the ſhip's remaining at *St. Euſtatia*, and completing her cargo there, inſtead of returning to *St. Kitts*. —Mr Juſtice *Willes* differed from the other judges.

Want of neceſſary repair.

2. The *want of neceſſary repair* is another excuſe for a departure from the direct courſe of the voyage. If, in the courſe of the voyage, the ſhip, from ſtreſs of weather, damage received from an enemy, or any other cauſe, be reduced to ſuch a ſtate that ſhe cannot ſafely proceed on her voyage, without repairs, the captain will be juſtified in carrying the ſhip to ſome port, the leaſt out of his courſe, where ſuch repairs can be had; and he muſt content himſelf with ſuch repairs as can be moſt expeditiouſly done, ſo as to enable the ſhip to perform the voyage inſured.

A ſhip, inſured from *Fort St. George* to *London*, goes to *Bengal* to refit: This is no deviation, if ſhe could not refit at *Fort St. George*, and *Bengal* was the neareſt place.

As where a ſhip was inſured "from *Bengal* to *London*; "the adventure to commence from her arrival at *Fort St.* "*George*, with liberty to ſtay at any ports or places with- "out prejudice."—The ſhip came to *Fort St. George* in *February* 1733 in her way to *England*; but being leaky, and in very bad condition, by the advice of the governor and council, ſhe ſailed for *Bengal to be refitted*. After being ſheathed, ſhe, in her homeward voyage, was ſtranded and loſt.——There was evidence to prove that *Bengal* was the proper place to refit, and that the ſhip had her lading taken out, and went thither for that purpoſe

Motteaux v. *Lond. Aſſur.* 1 *Atk.* 545.

poſe only: That this was a voyage of neceſſity, and not a trading voyage; for ſhe took nothing on board but proviſions and ballaſt. Lord Chancellor *Hardwicke*, though he admitted that want of neceſſary repair would juſtify a ſhip in going to the neareſt place where that could be had; yet, as there was no proof to ſhew that the ſhip could not have been equally repaired at *Fort St. George*, he directed an iſſue to try whether the loſs had happened during the voyage inſured. The cauſe was tried at *Guildhall*, and the inſured recovered.

So, where an inſurance was made on a ſhip, "At and "from *Rochelle* to the coaſt of *Africa*, during her ſtay "and trade there, and at and from thence to *St. Domingo*." —Three days after the ſhip ſailed from *Rochelle*, ſhe met with a gale of wind, which ſtrained her ſeams, and ſplit her mizen yard, and damaged her rigging. The crew, in a body, deſired the captain, for the preſervation of their lives, to make to ſome port to repair. The captain, finding that the ſhip, which was new, had too little ballaſt, complied, and put into *Liſbon* the neareſt port; from whence, after taking 500 rolls of tobacco, as ballaſt, (*a*) he proceeded to *Guinea*, and from thence to *St. Domingo*, but the ſhip was captured in ſight of that iſland.— In an action on the policy, it was inſiſted, on the part of the defendant, that going to *Liſbon* was a deviation, and witneſſes were called to prove that, from the latitude in which the ſtorm happened, ſhe might have proceeded to the coaſt of *Africa*, and there have repaired at a leſs expenſe, and that ſhe could not need additional ballaſt. But it came out that no additional premium would have been required for liberty to touch at *Liſbon*.— Lord *Mansfield* laid much ſtreſs on this circumſtance, (*b*) and

Guibert v. *Redſhaw*, at N. P. Hil. Vac. 1781. *Park* 301, S. P.

(*a*) For any thing that appears in the note of this caſe, the captain went to *Liſbon* only for ballaſt, nor does it appear that the ſhip had any ſort of repair there. Perhaps the neceſſity of getting more ballaſt would have juſtified going to *Liſbon*; but that is not the ground upon which the caſe is ſtated to have been put.—(*b*) The reaſon why a deviation diſcharges the underwriter is, not becauſe the riſk is thereby increaſed, but becauſe

and left it to the jury on the ground of neceſſity to go to *Liſbon* for repairs.—The plaintiff had a verdict.

Joining convoy.

3. A third cauſe of juſtifiable deviation is when the ſhip is obliged to go out of her direct courſe in order *to join convoy.* (*a*)

If a ſhip go out of her way to join convoy this is no deviation.

As where the *William* galley was inſured, "From *Bremen* to *London*, warranted to depart with convoy."—The galley ſailed from *Bremen* under convoy of a *Dutch* man of war, to the *Elb*, where they were joined by two other *Dutch* men of war and ſeveral *Engliſh* merchant ſhips. From thence they ſailed to the *Texel*, where ſhe found a ſquadron of *Engliſh* men of war. After a ſtay of nine weeks, they ſailed from the *Texel*, and the galley being ſeparated in a ſtorm, was taken by a *French* privateer, retaken by a *Dutch* privateer, and paid 80 l. ſalvage.—In an action on the policy to recover this loſs, it was ruled by Lord C. J. *Holt*, that the voyage ought to be according to uſage, and that their going to the *Elb*, though in fact out of the way, was no deviation; for, till after the year 1703, there was no convoy for ſhips directly from *Bremen* to *London*, and the plaintiff had a verdict.

Bond v. *Gonſales*, at N. P. 2 *Salk.* 445.
S. P. *Gordon* v. *Morley*, ſup. 265; and *Campbell* v. *Bourdieu*, 2 *Str.* 1265, S. P. *Bond* v. *Nutt*, *Cowp.* 601. ſup. 255.

Avoiding an enemy.

4. To eſcape from, or avoid, an enemy, is another cauſe of excuſable deviation, of the ſame nature as the laſt. (*b*)

Mutiny of the crew.

5. The laſt caſe of this ſort which I ſhall mention is, where the captain, under the compulſion of a mutinous crew, is forced to leave the direct courſe of his voyage, and put into port.

As

cauſe the voyage performed is not the voyage inſured. (Vid. ſup.) The circumſtance of the premium being the ſame, had liberty to touch at *Liſbon* been given in the policy, ought not therefore, to have had any other effect than to prove that it was not originally intended to put into *Liſbon*; for if that had been intended, it might have been provided for in the policy, without any additional expenſe of premium.—(*a*) Per Lord *Mansfield* in *Bond* v. *Nutt*, ſup. 257.—(*b*) *Roccus*, Reſp. 30, n. 1, & 31. n. 3. *Caſaregis*, diſ. 1, n. 68. *Pothier*, h. t. n. 51. *Emerig.* tom. 2, p. 57.

As, where a letter of marque, inſured for a voyage from *Briſtol* to *Newfoundland*, ſailed with expreſs orders, that if ſhe ſhould take a prize, ſhe ſhould nevertheleſs proceed on her voyage; and that ſome hands ſhould be put on board the prize and ſent with it to *Briſtol*. A prize was taken in the courſe of the voyage, and the captain ordered ſome of the crew to carry it to *Briſtol*, while he proceeded on his voyage: But the crew oppoſed him, and inſiſted on his going back, though he acquainted them with his orders. He was forced however to ſubmit, and on his return, his own ſhip was taken.—The underwriters inſiſted that this was a deviation which diſcharged them: But Lord Chief Juſtice *Lee* held that this was excuſed by the force upon the maſter, which he could not reſiſt; and therefore fell within the excuſe of neceſſity, which had always been allowed. (*a*)

The crew of a letter of marque compel the captain to return home with a prize, inſtead of proceeding on his voyage according to his orders; this will excuſe the deviation.

Elton v. *Brogden*, at N. P. 2 *Str.* 1264. Inf.

From theſe authorities it is plain that nothing will juſtify a deviation but a real and imperious neceſſity, and that the extent of the deviation muſt be juſtified by the degree of that neceſſity.

The *extent* of the deviation muſt be juſtified by the degree of neceſſity.

It only remains to be obſerved, that where a ſhip is compelled by any neceſſity to deviate from the uſual and regular courſe of the voyage, ſhe muſt purſue the new voyage of neceſſity ſo as to get to her port of deſtination by the ſhorteſt and ſafeſt courſe ſhe can take; and any wilful departure from the direct courſe of this voyage, or any unneceſſary delay, will be a new deviation, which will diſcharge the underwriters in like manner as if it had been a deviation from the original voyage. (*b*)

And the inſured muſt not deviate from the voyage of neceſſity.

(*a*) Vid. inf. S. C. under the head of barratry.—(*b*) R. *Lavabre* v. *Wilſon*, *Doug.* 271, ſup. 186, 399.

CHAP.

CHAP. XIII.

Of Loſs.

A LOSS, in inſurance, is the injury or damage ſuſtained by the inſured in conſequence of the happening of one or more of the accidents or misfortunes againſt which the inſurer, in conſideration of the premium, has undertaken to indemnify the inſured. Theſe accidents or misfortunes, or perils, as they are uſually denominated, are all diſtinctly enumerated in every policy. In our common policies they are ſet forth in the following words.

Perils uſually inſured againſt.

'Touching the adventures and perils which we the aſ-'ſurers are content to bear, and do take upon us in this 'voyage, they are of the ſeas, men of war, fire, enemies, 'pirates, rovers, thieves, jettiſons, letters of mart and coun-'ter mart, ſurpriſals, takings at ſea, arreſts, reſtraints, and 'detainments of all kings, princes, and people, of what 'nation, condition, or quality ſoever, barratry of the maſ-'ter and mariners, and of all other perils, loſſes, and miſ-'fortunes, that have or ſhall come to the hurt, detriment 'or damage of the ſaid goods and merchandizes, and ſhip, '&c. or any part thereof.

Total loſs.

Every loſs is either total or partial. The term *total loſs* is underſtood in two different ſenſes; natural and legal. In its natural ſenſe, it ſignifies the abſolute deſtruction of the thing inſured. In its legal ſenſe, it means not only the total deſtruction, but likewiſe ſuch damage, to the thing inſured, though it may ſpecifically remain, as renders it of little or no value to the owner. So a loſs is ſaid to be total, if, in conſequence of the misfortune that has happened, the voyage be loſt, or not worth purſuing,

ſuing, and the projected adventure fruſtrated; or if the value of what is ſaved be leſs than the freight, &c.

A *partial loſs* is any loſs or damage ſhort of, or not amounting to, a total loſs; for if it be not the latter, it muſt be the former.—Thus, if a ſhip, inſured for a given voyage, arrive at her port of deſtination, and there remain 24 hours moored in ſafety; or, if ſhe be inſured for a *term*, and ſhe ſurvive the term; no injury which ſhe could have ſuſtained during the voyage, in the one caſe, or during the term, in the other, however great, can amount to a total loſs. (*a*) So, in the caſe of an inſurance on goods; the inſurer contracts that they ſhall arrive ſafe at the port of delivery; or if not, that he will indemnify the inſured. If they ſpecifically remain and are actually landed at the port of delivery, however damaged in the voyage, the injury will amount but to a partial loſs. (*b*)

Partial loſs. To ſhip. To goods.

Partial loſſes are ſometimes denominated *average* loſſes, becauſe they are often of the nature of thoſe loſſes which are the ſubject of average contributions; and they are diſtinguiſhed into general and particular averages. (*c*)

Average loſs.

Having premiſed thus much of the nature and different kinds of loſſes, we will now proceed to conſider this branch of our ſubject under the following heads:

1. Loſs by the perils of the ſea;
2. Loſs by running foul of another veſſel;
3. Loſs by fire;
4. Loſs by capture;
5. Loſs by arreſt and detention of princes;
6. Loſs by barratry;
7. Loſs by average contributions;
8. Loſs by expenſe of ſalvage;
9. Of wilful and fraudulent loſſes.

Sect.

(*a*) Vid. *Cazalet* v. *St. Barbe*, *Furneau* v. *Bradley*, *Fitzgerald* v. *Poole*, inf. c. 14, § 2.—(*b*) Vid. *Cocking* v. *Fraſer*, ſup. 144.—(*c*) Vid. inf. § 7.

Sect. 1.

Of Loſs by the Perils of the Sea.

What is meant by perils of the ſea.

IN a large ſenſe, all the accidents or misfortunes to which thoſe engaged in maritime adventures are expoſed, may be called perils of the ſea. (*a*) But it has been found convenient to diſtinguiſh the loſſes to which ſhips and goods at ſea are liable, by the *immediate cauſes* to which they may be particularly aſcribed. In this view, loſſes *by the perils of the ſea* are underſtood to mean only ſuch accidents or misfortunes as proceed from mere *ſea-damage*, that is, ſuch as ariſe from ſtreſs of weather, winds, and waves, from lightning and tempeſts, from rocks and ſands, &c.

Foundering.

A loſs by the perils of the ſea may therefore happen, *firſt*, by the ſhip's foundering at ſea, and then it muſt, in moſt caſes, be total in the ſtricteſt ſenſe of the word: *Secondly*, by ſtranding, which is either *accidental*, as where the ſhip is driven on ſhore by the winds and waves; or *voluntary*, as where ſhe is intentionally run on ſhore, either to preſerve her from a worſe fate, or for ſome fraudulent purpoſe. A ſtranding may be followed by ſhipwreck, in which caſe it becomes a total loſs; or the ſhip may be got off in a condition to proſecute her voyage, and then the damage ſuſtained and the expenſes incurred will be only a partial loſs of the nature of a general average:— *Thirdly*, by the ſhip's ſtriking againſt a ſunken rock, or any other thing under water, which may occaſion the ſpringing of a leak, or abſolute ſhipwreck.

Stranding.

Striking againſt a ſunken rock, &c.

If a ſhip be not heard of within a reaſonable time, ſhe ſhall be preſumed to have foundered at ſea.

It often happens that ſhips founder at ſea, and all on board periſh, and this out of the view of any perſon who could convey any information of the misfortune to the owners. In ſuch caſe, therefore, there can be no poſitive proof of the cauſe of the loſs. But where no intelligence has been received of a ſhip within a reaſonable time after ſhe has ſailed,

(*a*) Vid. 2 *Rol.* Ab. 248, pl. 10; *Comb.* 56; 1 *Show.* 322, 3.

ſailed, it may reaſonably be preſumed that ſhe foundered at ſea; becauſe every other loſs would probably, ſooner or later, have been heard of.

A ſhip not being heard of in four years after ſhe ſailed, the inſured may ſue the underwriters as for a loſs by *ſinking at ſea.*

Green v. *Brown*, at N. P. 2 Str. 1199.

As, where a ſhip was inſured in 1739, "from *North* "*Carolina* to *London*, with a warranty againſt captures "and ſeizures."—Four years after the ſhip ſailed, an action was brought on the policy, and in the declaration the loſs was alleged to have happened *by ſinking at ſea*, and the evidence was, that ſhe ſailed on her intended voyage, and had never afterwards been heard of.—It was inſiſted, for the defendant, that, as captures and ſeizures were excepted, it lay upon the plaintiff to prove that the loſs happened in the particular manner declared on.—But Lord C. J. *Lee* ſaid, that it would be unreaſonable to expect certain evidence of ſuch a loſs, where every perſon on board is preſumed to have periſhed: And all that can be required is, the beſt proof the nature of the caſe admits of. He therefore left it to the jury, who found for the plaintiff.

A ſhip ſails from *Newcaſtle* for *Copenhagen*, and is never after heard of, and ſeveral others that ſailed after ſhe did, arrived ſafe: This is ſufficient evidence that ſhe periſhed at ſea.

Newby v. *Read*, at N. P. Mich. Vac. 3 *G.* III. *Park* 63.

So, where a ſhip was inſured, "Againſt any loſs hap- "pening before the 30th of *November* 1762, free from "average."—The ſhip ſailed from *Newcaſtle* for *Copenhagen*, (*a*) which is uſually about ten days voyage; but was taken by a *French* privateer, and ranſomed; and then proceeded on her voyage to *Copenhagen* in a bad condition. She never was heard of afterwards, though all due diligence was uſed to obtain intelligence of her, and ſeveral ſhips that ſailed after ſhe did, arrived ſafe at *Copenhagen*.—Lord *Mansfield* told the jury that this evidence was a ſufficient ground to preſume that the ſhip periſhed at ſea, unleſs the contrary appeared. The jury accordingly found for the plaintiff.

In ſome countries there is a limitation of time for this preſumption.

In *France* and *Spain* poſitive regulations have been made, to aſcertain the time when the inſured may call on the underwriters for the loſs, on the preſumption that a miſ-

ſing

(*a*) It is ſtrange that in the note of this caſe there is no mention of the time of the ſhip's ſailing, nor does it appear how long after ſhe ſailed the plaintiff brought his action.

ſing ſhip has periſhed at ſea. In *Spain*, if a ſhip has not been heard of for a year and a half from her departure on a voyage to or from the *Indies*, ſhe is deemed loſt. In *France*, after a year from a ſhip's ſailing on *common voyages*, and two years on *diſtant voyages*, the inſured may abandon and demand payment without other proof of loſs. (*a*)

In *England* there is no ſuch limitation.

With us there is no time fixed by law when a miſſing ſhip ſhall be preſumed to have foundered at ſea. Every caſe muſt depend on its own circumſtances; and it would be difficult to frame any certain uniform regulation for this purpoſe, that might not be productive of more inconvenience than advantage. Perſons well acquainted with maritime affairs may form a pretty correct judgment when a ſhip, in any caſe, may be reaſonably deſpaired of. When that time arrives, a liberal underwriter will pay his loſs; and if any doubt remain, he may either demand ſecurity from the inſured to refund the money, in caſe the ſhip ſhould afterwards arrive ſafe, or he may truſt to his remedy by action, to recover it back. (*b*)

If a ſhip be driven by ſtreſs of weather on an enemy's coaſt, and there captured; this is a loſs by capture, not by the perils of the ſea.

Every loſs muſt be imputed to its immediate, and not to any remote cauſe. Therefore, if a ſhip be driven by ſtreſs of weather on an enemy's coaſt, but not materially damaged, and ſhe be there captured; this is not a loſs by the perils of the ſea, but by *capture*; and for this the inſured may recover upon a policy againſt capture only. (*c*) And yet it has been holden that capture is a loſs by the perils of the ſea, as much as if it were occaſioned by ſhipwreck or tempeſt. (*d*)

If ſlaves be thrown overboard, on account of a ſcarcity of water, occaſioned by the captain's miſtaking his courſe; this is not a loſs by the perils of the ſea.

If the maſter of a ſlave ſhip miſtake his courſe, whereby a ſcarcity of water enſues, and a number of ſlaves are thrown overboard to ſave the reſt; it will not be ſufficient for the inſured, in declaring for this loſs, to ſtate that, by contrary winds and currents, and *the perils of the*

(*a*) Vid. 2 *Mag.* 33. 177. Ord. of *Louis* XIV, h. t. art. 58.—(*b*) Vid. *Tomkins* v. *Bernet*, 1 *Salk.* 22.—(*c*) Per Lord *Kenyon*, at N. P. *Green* v. *Elmſlie*, *Peake* 212, inf. c. 17, § 5. —(*d*) 2 *Rol.* Ab. 248, pl. 10, *Comb.* 56. 1 *Show.* 322, 3.

the ſea, the ſhip was retarded, and the ſlaves periſhed for want of water. (*a*)

So, where a number of ſlaves periſhed for want of ſufficient and proper food, and this failure was occaſioned by extraordinary delay in the voyage, ariſing from bad and ſtormy weather; this was holden to be a loſs by natural death, and not by the perils of the ſea. (*b*)

So, if the ſlaves die for want of food, occaſioned by the extraordinary length of the voyage.

So, where a ſhip was inſured from *St. Bartholomew* to the coaſt of *Africa*, and during her ſtay and trade there, and back to *St. Bartholomew*.—In an action upon this policy for a total loſs by the *perils of the ſea*, it was attempted to recover as for a total loſs, upon evidence that ſhe was deſtroyed by the worms, which are well known to infeſt the rivers in hot climates. A merchant ſwore that he had known many inſtances of loſs by this ſpecies of injury, but that the underwriters had uniformly refuſed to pay.—Lord *Kenyon*, who tried the cauſe, decided, upon this evidence, that this was not a loſs by the perils of the ſea; and the jury unanimouſly concurred with his lordſhip, and found a verdict for the defendant.

If a ſhip be deſtroyed by worms, this is not a loſs by the perils of the ſea.

Rhol v. *Parr*, Eſp. 444. Inf.

The

(*a*) It were impoſſible to paſs over the mention of this caſe, without ſome mark of reprobation. Falſe reaſoning has never been carried to the length of maintaining that human beings, however degraded their condition, could be juſtifiably thrown overboard, like ſo many bales of goods, to lighten a ſhip in a ſtorm. Every thing on board, however precious, ſhould be thrown into the ſea ſooner than the meaneſt ſlave. Some have ſuppoſed that if, in a caſe of extreme neceſſity, a part of the crew might be ſacrificed to ſave the reſt, the fate of the victims ſhould be determined by lot equally amongſt all. But *Puffendorff*, with ſounder reaſoning, maintains, that whoever, under pretence of ſaving the ſhip, ſhould throw men into the ſea, whether freemen or ſlaves, and whether by lot or without lot, is guilty of homicide; for no man, in order to ſave his own life, has a right to take away the life of any other human being, who does not attack him. Vid. *Puffend.* lib. 2. c. 6. § 3. ff. de reg. jur. 32. *Cic.* off. l. 3. c. 23.—(*b*) *Rhol* v. *Parr*, 6 T. R. 656, inf. c. 15. § 1.

The inſurer is not anſwerable for any damage to the ſhip occaſioned by the ordinary ſervices ſhe is engaged in.

The inſurer is not anſwerable for any diminution in the value of the ſhip, her rigging or furniture, if this be occaſioned by the ordinary ſervice ſhe is engaged in. As if a cable break by the friction of the rocks, and an anchor be loſt, the inſurers are not anſwerable. But if, by ſome extraordinary accident, as the violence of the winds or waves, it become neceſſary to ſlip a cable, or a cable be broke, and an anchor loſt, or a ſail or yard be carried away, this is a loſs by the perils of the ſea within the policy. (*a*)

For what loſs of animals the inſurer is liable.

If animals be inſured, their death, occaſioned by tempeſts, by the ſhot of an enemy, by jettiſon in a ſtorm, or by any other extraordinary accident, is a loſs within the policy. Not ſo, if it be occaſioned by diſeaſe. (*b*)—*Valin*, and after him *Pothier*, claſs animals and negro ſlaves under the ſame head, and apply the ſame rules to both. (*c*)

Sect. 2.

Of Loſs by Running Foul.

A SPECIES of damage to which ſhips at ſea are often expoſed, is that occaſioned by one ſhip running foul of another. This may be the effect of mere accident, without blame being imputable to the maſter of either ſhip; or it may be occaſioned by the negligence or miſconduct of one or both of them. The injury occaſioned by this accident is a loſs within the policy, (*d*) unleſs it be imputable to the miſconduct of the maſter or mariners of the ſhip inſured; in which caſe the inſurer is not liable, according

(*a*) *Valin* ſur art. 29, p. 76. *Pothier*, h. t. n. 66. *Emerig.* tom. 1, p. 393.—(*b*) *Emerig.* ib.—(*c*) Vid. *Valin* ſur art. 11, and 15. *Pothier*, h. t. n. 66.—(*d*) Vid. Ord. de *Louis* XIV., tit. *avaries*, art. 11, and tit. *aſſurance*, art. 26.

according to the opinion of *Emerigon.* (*a*) But in ſuch caſe, the miſconduct of the maſter or mariners would, I conceive, amount to barratry; and as that is a riſk always mentioned in our policies, the inſurer would be liable for the loſs. An action, however, would lie againſt the maſter of either ſhip, to whom negligence or miſconduct is imputable, for the loſs he has occaſioned.

Sect. 3.

Of Loſs by Fire.

Whether a loſs by fire imputable to the fault of the maſter or mariners, be a loſs within the policy.

THERE can be no doubt but that a loſs occaſioned by fire which is merely accidental, and not imputable to any fault of the maſter or mariners, is a loſs within the policy; and in many places the inſurer is held to be liable, even where the fire happens by the fault of the maſter or mariners. (*b*) But in *France* the inſurer is not held anſwerable in ſuch caſe, unleſs, by the policy, he be liable for barratry. (*c*)

If a ſhip be burnt by order of the ſtate where ſhe happens to be, to prevent infection; this is a loſs within the policy.

Emerigon mentions two caſes on this ſubject.—In the one, a *Dutch* veſſel was refuſed admittance into the port of *Majorca*, and was burnt by the *Spaniards*, from an apprehenſion that ſhe had the plague on board: There the inſurer was holden to be liable, no blame being imputable to the maſter or mariners.—In the other, a ſhip, with the plague on board, of which ſeveral perſons had died, was carried into the port of *Marſeilles*, the maſter pretending that the deaths were occaſioned by *unwholeſome food.* The infection was communicated to the town and neighbouring country. The ſhip was burnt.—Here it was determined that the inſurer was not liable, upon the ground that the loſs was occaſioned by the miſconduct of

(*a*) Vid. *Emerig.* tom. 1, p. 413.—(*b*) *Straccha*, gl. 18, *Targa*, ch. 65. *Emerig.* tom 1. p. 434.—(*c*) *Pothier*, h. t. n. 53. *Emerig.* ib.

of the maſter. (*a*)—In this caſe barratry could not have been one of the perils inſerted in the policy.

If a ſhip be attacked by an enemy, and the maſter find it impoſſible to defend her, he may leave her and ſet her on fire, to prevent her falling into the enemy's hands, provided he can preſerve the lives of the crew. In ſuch caſe, the inſurer is liable for the loſs; for the maſter was juſtified in burning the ſhip under ſuch circumſtances. (*b*)

Sect. 4.

Of Loſs by Capture.

What ſhall be deemed a capture.

CAPTURE is when a ſhip is ſubdued and taken by an enemy in open war, or by way of repriſals, or by a pirate, and with intent to deprive the owner of it.—Capture may be with intent to poſſeſs both ſhip and cargo, or only to ſeize the goods of the enemy, or contraband goods, which are on board.—The former is a capture of the ſhip in the proper ſenſe of the word; the latter is only an arreſt and detention, without any deſign to diſpoſſeſs the owner.—Capture is deemed *lawful*, when made by a declared enemy, according to the laws of war; and *unlawful*, when it is againſt the rules eſtabliſhed by the law of nations.

Every capture, whether lawful or unlawful, is a loſs within the policy.

But for every loſs occaſioned by capture, whether lawful or unlawful, and whether by friends or enemies, the inſurer is liable, (*c*) the words of the policy being ſufficiently comprehenſive to include every ſpecies of capture to which ſhips at ſea can ever be expoſed.

And the inſurers are anſwerable, to the extent of the ſum inſured, for the loſs actually ſuſtained.

And in every caſe of capture the inſurer is anſwerable, to the extent of the ſum inſured, for the loſs actually ſuſtained. This may be either *total*, as where the ſhip or goods

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(*a*) *Emerig.* ut ſup.—(*b*) *Pothier*, h. t. n. 53. *Valin*, art. 26. h. t.—(*c*) *Le Guidon*, ch. 7. n. 1. *Caſaregis*, diſc. 1, n. 118. *Roccus*, n. 41, 54, 55, 64, 66. *Valin*, art. 26, h. t. *Pothier*, h. t. n. 54.

goods insured are not recovered again; or *partial*, as where the ship is recaptured or restored before abandonment; in which case the insurer is bound to pay the salvage, and any other necessary expense the insured may have been put to for the recovery of his property.

And the insurer is liable for a loss by capture, whether the property in the thing insured be changed by the capture or not. For a ship is lost by capture, though she be never condemned, or even carried into any port or fleet of the enemy. It can never, therefore, be a question between the insurer and the insured, whether the capture be lawful or not, or whether the property be changed by condemnation, or by being carried into an enemy's port. A capture by a pirate, or under a commission, when there is no war, does not change the property; and yet, as between the insurer and the insured, it is just upon the same footing as a capture by an enemy in open and declared hostilities: For whatever rule ought to be observed in questions of this sort, as between the owner and the *recaptor* or his *vendee*, it can in no way affect the case, as between the *insured* and the *insurer*.

And they are liable, whether the property be changed or not by the capture.

Therefore, as to the length of possession by an enemy, which is deemed sufficient to divest the property out of the original owner, or the effect of a recapture in revesting it,—these are now matters which can never come directly in question between insurer and insured. They never could have come in question, in any case of insurance upon *real interest*; because, according to the above principles, they never could have varied the case. They could only have had their origin in gaming insurances, in which there could be no average or benefit of salvage, and in which, therefore, it was always necessary to set up a total loss, for the purpose of the wager. In gaming insurances, when there was a re-capture, the claim, as for a total loss, seems formerly to have involved the question, whether the property in the thing insured had, by the capture, or any proceeding founded on it, been

Therefore the effect of capture and recapture, in divesting or revesting the property, can make no question, except in insurances without interest.

The ſhip is taken and carried into the enemy's port; and after 8 days cut out, and reſtored to the owner, on payment of ſalvage; yet the inſured ſhall recover as for a total loſs.

Dean v. *Dicker*, at N. P. 2 Str. 1250.

her paſſage was taken by a *Spaniſh* privateer, and carried into a port in *Spain*, kept there eight days, and then cut out by an *Engliſh* ſhip.—The plaintiff inſiſted that this inſurance, though on goods, was to be conſidered as a wager on the bottom of the ſhip, and therefore, he was entitled to recover as for a total loſs.—The defendant ſaid, that, by the ſtat. 13 *G.* II. c. 4, the ſhip and cargo were to be reſtored to the owners upon paying ſalvage; (*a*) and that this was only an average loſs, and the plaintiff could only recover in the caſe of a total loſs.—Lord C.J. *Lee* held, that the plaintiff was entitled to recover: For this was a wager upon a total loſs, and here had happened one, by the ſhip's being carried into port, and there detained eight days: That where the policy is, "*intereſt or no intereſt*," the proviſions of the act, in caſes of valued policies, could not take place: That the act does not declare that the property is not gone by ſuch a capture, but only provides for reſtoring the ſhip to the *former owner*: But, that it might be otherwiſe, where the ſhip was re-captured before ſhe was carried *infra præſidia*; or in caſe of goods actually on board, and upon a valued policy.

A captured ſhip is inſured *intereſt or no intereſt*, retaken after 12 days, and ſold by the owner to pay the ſalvage; yet this is a total loſs.

Whitehead v. *Bance*, at N. P. B. R. Mich. 1749. *Park* 77.

So, where an inſurance was made on a ſhip "*intereſt or no intereſt, free of average*, &c. from *Jamaica* to *Hull*." —In her voyage ſhe was taken by a *French* privateer, and carried into *Hamburgh*; and after being twelve days in the hands of the enemy, was retaken by an *Engliſh* ſhip, and brought to *London*, where ſhe was adjudged to be reſtored to the owner, paying ſalvage. The owner ſold the ſhip and paid the ſalvage.—In an action on the policy, this was holden to be a loſs of the voyage; (*b*) and a verdict was given accordingly.

The effect of a capture and recapture in diveſting or reveſting property.

But though no queſtion can now ariſe, between the inſured and the inſurer, as to the effect of a capture or recapture in diveſting or reveſting the property; yet, as it may ſometimes be of importance, in matters of inſurance to know how the law ſtands on the ſubject, it may not be improper, in this place, to inquire ſhortly, when

(*a*) Vid. inf. § 7, how ſalvage is at preſent regulated.—
(*b*) By the *loſs of the voyage* is here to be underſtood a *total loſs*.

when a capture ſhall be deemed to transfer the property to an enemy, and what ſhall be the effect of a recapture in reveſting it in the original owner.

Voet on the pandects, and ſeveral authors he refers to, maintain with great earneſtneſs, *per ſolam occupationem, dominium prædæ hoſtibus acquiri.* (*a*) But the general opinion ſeems to be, that by the law of nations, the property of things captured in war is changed when all reaſonable hope of recovering them is gone; and, with reſpect to things moveable, all reaſonable hope of recovering them is preſumed to be gone when they are brought within the protection of the enemy's fortreſs. (*b*)

Opinions of different authors on this ſubject.

But what cuſtody of ſhips or effects taken at ſea, ſhall be equivalent to a placing of things captured on land *infra præſidia*, is a ſubject of much doubt and diſpute. *Grotius* ſays, that ſhips or goods taken at ſea become the property of the captors, when they are brought into the enemy's harbours, or to the place where his whole fleet is ſtationed; for then all hopes of recovering them may be ſaid to vaniſh. But, he adds, that by the law of nations as introduced among *European* ſtates in more modern times, things are conſidered as captured when they have been 24 hours in the power of the enemy. (*c*)

Bynkerſhoeck, and ſeveral writers whom he follows, abſolutely deny this pretended rule of the law of nations, and

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(*a*) *Voet*, lib. 49, tit. 15, vol. 2, p. 1155.—(*b*) Cæterum in hâc belli quæſtione, placuit gentibus, ut cepiſſe rem is intelligatur qui ita detinet ut recuperandi ſpem probabilem alter amiſerit, aut ut res perſecutionem effugerit. Hoc autem in rebus mobilibus ita procedit, ut capta dicantur ubi intra fines, id eſt præſidia hoſtium, perducta fuerint. *Grot.* de jur. bel. ac pac. lib. 3, c. 6, § 3. Vid. *March* Rep. 110.—(*c*) Cui conſequens eſſe videtur, ut in mari navis et res aliæ captæ conſeantur tum demum cum in navalia aut portus, aut ad eum locum ubi tota claſſis ſe tenet, perductæ ſunt.—Nam tunc deſperari incipit recuperatio. Sed recentiori jure gentium inter *Europæos* populos introductum videmus, ut talia capta conſeatur ubi per horas viginti quatuor in poteſtate hoſtium fuerint. *Grot.* ubi ſup.—Vid. *Conſolato del mare*, c. 283, 287. *Roccus*, not. 66.

and inſiſt on the rule of the *Roman* law, that the prize muſt be carried *infra præſidia* before it can become the property of the captor: and by *præſidia* he underſtands the *camps*, the *ports*, the *towns*, and the *fleets* of the enemy. (*a*)

Other writers have drawn other lines, by arbitrary diſtinctions, partly from policy, to prevent too eaſy a diſpoſition to neutrals, and partly from equity, to extend the *jus poſtliminii*, or the right of reclaiming what has been recovered from the enemy, in favour of the original owner. No wonder, therefore, that there is ſo much uncertainty, and ſuch a variety of notions among them about fixing a poſitive boundary by the mere force of reaſon, where the ſubject matter is arbitrary, and not the ſubject of reaſon alone. (*b*)

How conſidered by the law of *England*.

In our courts of admiralty it has always been holden that, by the marine law of *England*, independent of the ſtatute which commands reſtitution, and fixes the rate of ſalvage, the property is not changed in favour of a vendee or recaptor, ſo as to bar the original owner, till there has been a regular ſentence of condemnation: And in the reign of King *Charles* the Second, a ſolemn judgment was given upon this point; and reſtitution of a ſhip taken by a privateer was decreed, after ſhe had been fourteen weeks in the enemy's poſſeſſion, *becauſe ſhe had not been condemned*. (*c*) The ſame doctrine has, in ſeveral inſtances, prevailed in our courts of common law. (*d*) In one caſe it was holden that nine days poſſeſſion by the captor, and in another, that four years poſſeſſion, and ſeveral voyages performed, will not change the property, without a ſentence of condemnation. (*e*)

In

(*a*) Vid. *Bynk.* jur. pub. lib. 1, c. 4.—(*b*) Vid. Lord *Mansfield*'s judgment in *Goſs* v. *Withers*, 2 *Bur.* 695.—(*c*) Cited by Lord *Mansfield* as a caſe reported to him by Sir Geo. *Lee*.—Vid. *Goſs* v. *Withers*, 2 *Bur.* 695.—(*d*) *Aſſievedo* v. *Cambridge*, 10 Mod. 79.—(*e*) —— v. *Sands*, 10 Mod. 79. See Lord *Mansfield*'s obſervations on theſe caſes, 2 *Bur.* 695. The caſes themſelves are ſo defectively reported, that I have not thought them worthy of a more particular notice.

In every case of capture the insured may abandon.

In general, whenever a ship is taken by the enemy, the insured may abandon, and demand as for a total loss; and he is not bound to make any claim or appeal in the enemy's courts of admiralty, or to litigate there the validity of the capture. (*a*).

But he is not *bound* to abandon.

But the insured is in no case *bound* to abandon; and, as the law now stands, no capture by the enemy can be so total a loss as to leave no possibility of recovery, for the *jus postliminii* continues forever, except in the case of a captured ship converted into a ship of war. (*b*) If the owner himself should retake his ship or goods, he will be fully entitled to them; and if they be retaken at any time, whether before or after condemnation, he will be entitled to restitution, upon payment of a settled salvage. (*c*) —In what cases the insured may abandon and demand as for a total loss though the ship be recaptured and restored, or otherwise recovered by the insured, will be found fully explained in the second section of the ensuing chapter on abandonment.

If he do abandon, the insurer, in case of recapture, will stand in his place.

The chance of the owner's recovering his property, does not, however, suspend the demand of the insured, as for a total loss: But in the case of a recapture, justice is done to the insurer by putting him in the place of the insured. In questions upon policies of insurance, the nature of the contract as an *indemnity*, and nothing else, is always liberally considered. (*d*).

The insurer is liable for all fair charges occasioned by the capture.

When there has been a capture, whether legal or not, and the ship has been recaptured or restored, the insurer is bound to defray all necessary expenses which the insured has been put to for the recovery of his property. He is therefore liable for a sum of money paid by the insured to the captors, as a *compromise* made *bona fide*, to prevent the ship from being condemned as prize.

Thus:

(*a*) 2 *Bur.* 696. Adm. in *Tyson* v. *Gurney*, 3 T. R. 479. Vid. post. ch. 14, § 1.—(*b*) Vid. Stat. 33 *G.* III. c. 66, § 42.—(*c*) Vid. stat. 29 *G.* II. c. 34, § 24, and 33 *G.* III. c. 66, § 42. Inf. ch. 14, § 1.—(*d*) Vid. Lord *Mansfield's* judgment in *Goss* v. *Withers*, 2 *Bur.* 696, 7.

A ſhip warranted neutral is captured as an enemy's ſhip; and the owners, after an interlocutory decree againſt them, agree to a compromiſe: This being done *bonâ fide*, the inſurer is liable for the ſum paid by the inſured under ſuch compromiſe.

Berens v. Rucker, at N. P. 1 Bl. 313.

Thus:—The *Dutch* ſhip *Tyd* and her cargo were inſured "At and from *St. Euſtatia* to *Amſterdam*, warranted *Dutch* property, and not laden in any *French* port in the *Weſt Indies*."—In *May* 1758 the ſhip took in a cargo of ſugars, indigo, and other *French* commodities, partly out of barks, partly from the ſhore. On the 18th of *June* ſhe ſailed on her voyage, and on the 27th was taken by an *Engliſh* privateer, and carried into *Portſmouth*. Proceedings in the court of admiralty were begun in *Auguſt*, and after many delays and citations from court to court, an interlocutory order was pronounced, in *February* 1759, for the contumacy of the claimants in not ſpecifying what part of the cargo was taken from the ſhore, what from barks; and it was decreed that the goods ſhould be preſumed *French* property. There was an appeal to the lords commiſſioners of prizes, but as many cauſes ſtood before it, the market very high, and the cargo in part periſhable, the agent of the owners agreed with the captors to give them 800 l. and coſts to obtain the reverſal of the ſentence. This was obtained by conſent, and it was decreed that there was a ſufficient cauſe of ſeizure, in order to give coſts to the captors, and reſtitution was decreed to the owners. After the ſhip's arrival at *Amſterdam*, the chamber of inſurances there ſettled the average of the loſs and expenſes occaſioned by the capture, detention and litigation; and for this the action was brought.—Lord *Mansfield* ſaid;—"The firſt queſtion is, whether this was a juſt capture. (*a*) Both ſentences are out of the caſe, being done and undone by conſent. The capture was unjuſt. The pretence was, that part of this cargo was put on board off *St. Euſtatia*, out of barks ſuppoſed to come from the *French* iſlands, and not loaded immediately from the ſhore. It is now a ſettled point, that it is the ſame thing as if they had been landed on the *Dutch* ſhore, and put on board afterwards, in which caſe there is no colour for ſeizure. The rule

If the produce of an enemy's country be brought from thence in barks and put on board a neutral ſhip; this will be the ſame as if the goods had been ſhipped from the ſhore in a neutral port. But a neutral ſhip,

(*a*) This became a queſtion, on account of the warranty that the ſhip and cargo were *Dutch* property; for if the capture had been juſt, it would have falſified the warranty.

rule is, that if a neutral ſhip trade to a *French* colony, with all the privileges of a *French* ſhip, and is thus adopted and naturalized, it muſt be looked upon as a *French* ſhip, and is liable to be taken. Not ſo, if ſhe have only *French* produce on board, without taking it in at a *French* port; for it may be purchaſed of neutrals.—The ſecond queſtion is, whether the owners have acted *bonâ fide* and uprightly, as men acting *for themſelves*, and upon a reaſonable footing; ſo as to make the expenſes of this compromiſe a loſs to be borne by the inſurers. The judge of the admiralty's order to ſpecify was illegal; contrary to the marine law, and to the act of parliament which is declaratory of the marine law: Becauſe, if they had ſpecified, it would be of no conſequence, according to the rule before-mentioned. Yet the captors were in poſſeſſion of a ſentence, though an unjuſt one. And a court of appeal cannot, or ſeldom does, give coſts or damages which have accrued ſubſequent to the original ſentence; for thoſe damages ariſe from the fault of the judge, not of the parties. Under all theſe circumſtances, therefore, the owners did wiſely to offer a compromiſe. The cargo was worth 12,000 l.; the appeal was hazardous; the delay certain. The *Dutch* deputy in *England* negociated the compromiſe. The chamber of commerce at *Amſterdam* ratified it, and thought it reaſonable. Had the whole ſentence been reverſed, the coſts muſt have fallen heavy on the owners. I therefore think the inſurers liable to anſwer this average loſs, which was ſubmitted to, to avoid a total one." The jury found for the plaintiff.

trading to an enemy's colony, with all the advantages of an enemy's ſhip, is liable to capture.

Formerly it was a common practice to ranſom *Britiſh* ſhips, when captured by an enemy, by delivering to the enemy what was called a ranſom bill, which ſecured to the captor the price agreed upon, and operated as a bill of ſale of the ſhip and cargo to the original owners, and as a protection to the ſhip againſt other cruiſers of the enemy during the remainder of her voyage. A hoſtage was delivered to the captor to ſecure to him the punctual payment of the ſtipulated ſum.

Of ranſoming captured ſhips.

This

Actions at common law were formerly maintained on ranſom bills.

This ranſom bill, independent of the hoſtage, was conſidered as a contract of the law of nations, and obligatory upon the owners as well as upon the captain and hoſtage who ſigned it; (*a*) and actions have been often brought upon them in our courts of common law. And where the ſhip or goods were inſured, the amount of the ranſom was uſually taken to be the meaſure of the demand of the inſured upon the underwriters in reſpect of the capture. (*b*)

But it was at length determined that an alien enemy could not ſue for any right acquired by actual war.

Anthon v. *Fiſher*, *Doug.* 648, 9.

In the caſe of *Anthon* v. *Fiſher*, which was an action on a ranſom bill, and came before the court of King's Bench in *Trinity* Term 1782, it was contended on the part of the defendant, that as queſtions on ranſom bills ariſe out of *matter of prize*, and are to be decided therefore by the *jus belli*, ſuch queſtions are not triable in any court of common law, but belong excluſively to the courts of prize. The judges of the court of King's Bench differed in opinion upon this queſtion; there was judgment for the plaintiff in that court, *pro forma*, and the cauſe being removed by writ of error to the *Exchequer Chamber*, it was there unanimouſly determined, that an alien enemy cannot, by the municipal law of this country, ſue for the recovery of a right claimed to be acquired by him in actual war, and the judgment of the Court of King's Bench was reverſed.

And now, by ſtat. 22 *G.* III. c. 35, it is declared unlawful to ranſom any *Britiſh* ſhip taken by the enemy.

But this practice of ranſoming ſhips captured by the enemy being found to operate more to the diſadvantage than for the benefit of this country, it was at length thought proper to prohibit it altogether. And therefore by ſtat. 22 *G.* III. c. 25, § 1, it is enacted, 'That it 'ſhall not be lawful for any of his Majeſty's ſubjects 'to ranſom, or to enter into any contract or agreement 'for ranſoming any ſhip or veſſel belonging to any of his

(*a*) Si quid ſinguli hoſti promiſerint, eſt in eo fides ſervanda. *Cic.* Vid. *Burlamaqui*, part 4, ch. 4. *Vattel*, liv. 3, ch. 16, § 233. *Grot.* lib. 3, ch. 21, § 1.—(*b*) Vid. *Ricord* v. *Bettenham*, 3 *Bur.* 1734, 1 *Bl.* 563. *Cornu.* v. *Blackburne*, *Doug.* 619.

'his Majeſty's ſubjects, or any merchandizes or goods 'on board the ſame, which ſhall be captured by the ſub- 'jects of any ſtate at war with his Majeſty, or by any 'perſon committing hoſtilities againſt his Majeſty's ſub- 'jects.' By § 2, 'All contracts and agreements which 'ſhall be entered into, and all bills, notes, and other ſe- 'curities, which ſhall be given by any perſon or perſons 'for ranſom of any ſuch ſhip or veſſel, or of any mer- 'chandize or goods on board the ſame, ſhall be abſo- 'lutely void in law, and of no effect whatever.' And, by § 3, a penalty of 500 l. is given to the informer, for every offence againſt the act. This ſtatute has put an end to all queſtions on the law of ranſoms.

If a ſhip be recaptured before ſhe is carried into an enemy's port, ſhe may, with the conſent of the recaptors, proſecute her original voyage.

It often happens that a recaptured ſhip is in a ſtate to proſecute her original voyage; and, in that caſe, it is the intereſt of the recaptors, as well as of the other parties concerned, that ſhe ſhould be permitted to do ſo. The laſt prize act (*a*) has therefore very properly provided, 'That if a ſhip be retaken before ſhe has been carried 'into an enemy's port, it ſhall be lawful for her, if the 'recaptors conſent thereto, to proſecute her voyage; and 'it ſhall not be neceſſary for the recaptors to proceed to 'adjudication till ſix months after the recapture, or till 'the return of the ſhip to the port from whence ſhe 'ſailed; and the maſter, owners, or agents, with the 'conſent of the recaptors, may diſpoſe of their cargoes 'before adjudication: And in caſe the veſſel ſhall not re- 'turn to the port from whence ſhe ſailed, or the recaptors 'ſhall have had no opportunity of proceeding regularly to 'adjudication within the ſix months, on account of the 'abſence of the ſaid veſſel, the court of admiralty ſhall, at 'the inſtance of the recaptors, decree reſtitution to the 'former owners, they paying ſalvage, upon ſuch evi- 'dence as to the court ſhall, under all the circumſtances 'of the caſe, appear reaſonable; the expenſe of ſuch pro- 'ceeding not to exceed *fourteen pounds*.'

And the recaptors ſhall not be obliged to proceed to adjudication, till after ſix months, or the return of the ſh

Sect.

(*a*) Stat. 33 *G.* III. c. 66. § 44.

Sect. 5.

Of Loſs by Detention of Princes.

BY the terms of the policy the inſurer is anſwerable for all loſs occaſioned by "*arreſts or detainments of all "kings, princes, and people, of what nation, condition, or "quality ſoever.*" Under theſe words, which are nearly the ſame in the policies of all the maritime countries of *Europe*, the inſurers are liable for all loſſes occaſioned by arreſts or detention by the authority of any prince, or public body claiming to exerciſe ſovereign power, under what pretence ſoever.

What ſhall be deemed an arreſt and detention of princes.

As if the ſovereign of the country to which a ſhip belongs, or any other ſovereign, not at war with him, from motives of neceſſity, not of hoſtility, arreſt the ſhip either ſingly, or together with others in the ſame port or harbour; this is a detention of princes. (*a*)

Difference between capture and arreſt of princes.

There is an obvious difference between capture and arreſt of princes: The object of the one is prize; that of the other detention, with a deſign to reſtore the ſhip or goods detained, or to pay the value to the owner. And though neither of theſe ſhould be done, ſtill it muſt be conſidered as an arreſt of princes, becauſe the character of any action depends on the original deſign with which it was done.

If a ſhip be detained, upon a war breaking out; this is *capture*, not an arreſt.

When a ſhip is detained in a port after a declaration of war, or the iſſuing of letters of repriſal; this more reſembles *a capture* than a detention, and gives the inſured an immediate right to abandon, as for a loſs by capture, even though no condemnation be pronounced, and though the ſhip be afterwards reſtored. (*b*)

An arreſt of princes may be at ſea as well as in port.

An arreſt of princes may be at ſea as well as in a port or harbour, provided it be done from public neceſſity, not with a view to plunder. *Roccus* (*c*) mentions the

(*a*) Vid. *Le Guidon*, ch. 7, art. 6, and ch. 9, art. 6 and 13; *Valin*, tom. 2. p. 416.—(*b*) Vid. *Pothier*, h. t. n. 56.—(*c*) h. t. n. 60.

the caſe of a *Genoeſe* ſhip laden with corn, which was ſeized *at ſea* by the *Venetian* gallies, and carried into *Corfu*, where there was a famine at the time, and there ſold and paid for.—The inſured inſtituted a ſuit in the *Rota* of *Genoa* againſt the inſurers, and inſiſted that this was a *capture* for which they might abandon. The inſurers anſwered that this was merely a *detention of princes*, the object of which was, not to capture the ſhip, but to purchaſe the corn which the neceſſity of the public required. *Diverſo facta fuit, non ad capiendam navim, ſed ob publicam utilitatem grani conſequendi cauſâ. Licuit frumenta accipere, ſoluto pretio.*—This was held to be a good defence.

Seising a corn ſhip at ſea, for the relief of a place ſuffering under a famine, is only an arreſt of princes, not a capture.

And yet, if a neutral ſhip be arreſted at ſea, and carried into a port belonging to one of the belligerent powers, under pretence that ſhe belongs to the enemy, or that ſhe is laden with enemy's goods; this muſt be conſidered as a *capture*, becauſe it is done *as an act of hoſtility*; and the ſhip's being afterwards reſtored, will not change that which was originally a capture into a detention of princes. (*a*)—But in the caſe of *Saloucci* v. *Johnſon*, already particularly mentioned, (*b*) the court of King's Bench determined, that the refuſal of a neutral to ſubmit to a ſearch by a *Spaniſh* ſhip of war, and reſiſting with force, was no forfeiture of the ſhip's neutrality; and that the ſhip being arreſted and carried into *Spain* for this reſiſtance, the inſured was entitled to recover againſt the underwriters as for "*an improper detention.*" And though it has ſince been determined both in the court of King's Bench and the court of admiralty, that reſiſting a ſearch is a lawful cauſe of capture and confiſcation, (*c*) yet the above caſe of *Saloucci* v. *Johnſon*, may nevertheleſs, I conceive, be conſidered as an authority to prove that if a neutral ſhip be *unlawfully* arreſted and detained by a belligerent cruiſer for any pretended offence againſt the law of nations, this would be a detention of princes.

But if a neutral be taken at ſea, under pretence that ſhe is an enemy, this is a capture.

If ſhe be unlawfully arreſted under pretence that ſhe committed ſome offence againſt the law of nations; this is an arreſt of princes.

But

(*a*) *Emerig.* tom. 1, p. 537.—(*b*) Sup. 301.—(*c*) Sup. 303.

But if a ſhip be ſeized for navigating againſt the laws of a foreign ſtate; this is not a detention of princes.

But if a ſhip miſconduct herſelf; as by navigating againſt the laws of a foreign country, which ſhe is bound to obſerve, or for not paying cuſtoms, &c. and thereby ſubject herſelf to ſeizure or confiſcation; this ſhall not be deemed a loſs by reſtraint or detention of princes; (*a*) though, perhaps, it may amount to barratry of the maſter. (*b*)

An embargo is the moſt frequent cauſe of detention.

The moſt frequent cauſe of detention is an embargo, which is a proclamation or order of ſtate, uſually iſſued in time of war or threatened hoſtilities, prohibiting the departure of ſhips or goods from ſome or all of the ports of ſuch ſtate until further order. An embargo laid on ſhips and merchandize in the ports of this kingdom by virtue of the king's proclamation, is ſtrictly legal, when the proclamation does not contravene the ancient laws, or tend to eſtabliſh new ones; but only to enforce the execution of ſuch laws as are already in being, in ſuch manner as the King ſhall judge neceſſary. (*c*)

This, whether legal or not, is a detention within the policy.

But it is needleſs, in this place to enlarge upon the right of our own ſovereign, or that of any other, to lay embargoes. For whether an embargo be legally or illegally laid, the injury to the owner, by the detention of his ſhip or goods, is the ſame; and the inſurer is equally liable for the loſs occaſioned by it.

The word *people* in the policy means *a* people, or nation, not a mob of lawleſs rabble.

By the word *people* in the policy is not to be underſtood any promiſcuous or lawleſs rabble that may be guilty of attacking or detaining a ſhip: The following caſe will ſhew that it means *a* people; that is, a nation in its collective and political capacity.

A ſhip is forcibly ſeized by a tumultuous rabble: This is a loſs by pirates, but not by detention of a people.

A cargo of corn and coals was inſured from *Youghall* to *Sligo*, in *Ireland*.—The firſt count of the declaration, in deſcribing the loſs, ſtated that the ſhip, by ſtreſs of weather, was forced into *Elly Harbour*; where ſhe was, with force and violence, attacked, boarded, arreſted, and detained, *by people to the plaintiff unknown*; by reaſon whereof the corn was wholly loſt. In the ſecond count it was ſtated that the

Neſbitt v. *Luſhington*, 4 T. R. 783.

(*a*) Per Lord Commiſſioner *Hutchins*, 2 *Vern.* 176.—(*b*) Vid. *Saloucci* v. *Johnſon*, ſup. 301.—(*c*) 3 Inſt. 162, 4 Mod. 177, 179, 1 *Bl.* Com. 270.

the ſhip being in *Elly Harbour*, was with force and violence attacked and boarded, ſeized and taken by certain *pirates* to the plaintiff unknown, whereby the corn was wholly loſt.—The policy was in the uſual form.—It appeared that the ſhip was forced by ſtreſs of weather into *Elly Harbour*; and there happening to be a ſcarcity of corn there at the time, the people came on board the ſhip in a tumultuous manner, and would not leave her till they had forced the captain to ſell all the corn at a certain price, except 10 tons which was ſpoiled by the ſtranding and thrown overboard. The ſhip afterwards arrived at her deſtined port, with the coals. The court determined that this was a capture by pirates, and not a loſs within the meaning of the words arreſts, &c. of kings, princes, and *people*.—Lord *Kenyon* ſaid the word *people* meant *the ruling power of the country*. Mr. Juſtice *Buller* ſaid it meant the *ſupreme power of the country*, whatever that might be. This, he ſaid, appeared by another part of the policy; for where the wrongful acts of *individuals* are mentioned, they are deſcribed by the names of *pirates*, rogues, thieves. Then, having ſpecified all the *individuals* againſt whoſe acts the inſurance is made, it ſpecifies thoſe occaſioned by the acts of "kings, princes, and *people* of what nation, condition or quality ſoever;" which muſt apply to "nations" in their collective capacity. (*a*)

If a *Britiſh* ſhip be arreſted or ſeized by the authority of the *Britiſh* government, from ſtate neceſſity; this ſhall be a detention within the meaning of the policy, for which the inſurer is liable. (*b*)

If a ſhip be ſeized by authority of the *Britiſh* government; this is a detention within the policy.

(*a*) *Roccus*, (h. t. n. 54,) in the following paſſage, ſeems to interpret the uſual words of the policy in a larger ſenſe than that to which they are here reſtricted: Si merces captæ a poteſtate, ſeu judice juſtitiam adminiſtrante in illo loco, aut a populo *aut ab alia quacunque perſona*, per vim, abſque pretii ſolutione, tenentur aſſecuratores ſolvere æſtimationem dominis mercium, factâ prius per dominos mercium ceſſione ad beneficium aſſecuratorum, pro recuperandis illis mercibus, vel pretio ipſorum a capientibus.—(*b*) Vid. *Emerig.* tom. 1, p. 541. Ord. de la mar. h. t. 52. and *Valin*, tom. 2, p. 134.

A *Britiſh ſhip* is ſeized at *Jamaica*, and converted into a fire-ſhip by the government there: It ſeems the inſurer is liable.

As, where a ſhip was inſured, "from her arrival at —— "in *Jamaica*, and during her voyage to *London*:"—An embargo was laid on the ſhip by the government, who afterwards ſeized her, and converted her into a fire-ſhip, and offered to pay the owners.—The queſtion was whether this would excuſe the inſurers. Lord C. J. *Holt* ſeemed to be of opinion that it would not; and that this was within the words *detention of princes, &c.* But he gave no abſolute opinion, becauſe the cauſe was referred.

Green v. *Young*, at N. P. 2 Lord *Ray.* 640. *Salk.* 444.

If a ſhip, inſured *at and from* a certain port, be arreſted *in* that port, this is an arreſt within the policy.

So, if a ſhip be inſured "*at and from*" a given port, a detention by public authority, in that port, is a detention within the words of the policy. For the words of the policy being large enough to cover this riſk, nothing but ſome expreſs law or uſage to the contrary can exempt the inſurer. (*a*)

Thus:

(*a*) Some doubt ſeems to have been entertained on this point. *Roccus*, n. 65 ſays, "Regis et principis factum connumeratur inter caſus fortuitos; ideo, ſi rex et princeps retineant navem oneratam frumenta aſportare ad locum deſtinatum, tenentur aſſecuratores." This paſſage, and that which precedes it, plainly ſhew that the author meant a detention by the power under whoſe authority the ſhip was to ſail. *Le Guidon*, c. 7, § 1, treating of abandonment, ſays, that the inſured may abandon, "quand il advient du tout ou de partie, ou bien avarie qui excede ou endommage la moité de la marchandiſe, *quand il y a priſe d'amis ou d'enemis*, arret de prince, &c." The ord. de la mar. h. t. art. 52, contains theſe words. "Si le vaiſſeau étoit arrêté en vertu de nos ordres dans un des ports de notre royaume, *avant le voyage commencé*, les aſſureurs ne pourront, á cauſe de l'arrêt, faire l'abandon de leurs effets aux aſſureurs." *Valin*, commenting upon this article, (vol. 2, p. 134,) diſtinguiſhes the arreſt of a foreign prince, from that made by order of the King of *France*; he alſo diſtinguiſhes an arreſt in the port of loading, from an arreſt in any other port of *France*, where the ſhip happens to put in; and he ſays that only in the latter caſe an arreſt by the King is a ground to abandon. But *Pothier* (h. t. n. 59,) and after him, *Emerigon* (vol. 1, p. 541,) reject theſe diſtinctions, and maintain that the words, "*avant le voyage commencé*," mean before the *riſk* is commenced; and that if

Thus:—An insurance was made on three ships, *Adelaide*, *Adéle*, and *Victor*, their stores, &c.: Upon two of them, "*At and from L'Orient;*" and upon the third, "At, and from, and after, her arrival at *L'Orient;*" and upon all of them, "To all ports, seas, and "places whatsoever beyond, and on this side, the *Cape* "*of Good Hope* and *Cape Horn*, on the southern whale "and seal fishery and trade, and until their arrival back "at *L'Orient.*"—An action being brought on this policy, the loss was stated in the declaration to have happened by the ships, their stores and provisions, being, by the authority of certain persons exercising the powers of government in *France*, at *Port Louis* with respect to one, and at *L'Orient* with respect to the two others, *arrested and restrained* from further prosecuting their voyages.—The *Adelaide* sailed from *L'Orient* on the voyage insured, but was obliged to put back by stress of weather, into *Port Louis*; and on the 5th of *February* 1793, while she lay there, the *Adéle* and *Victor* were preparing for their voyages, and before the necessary passports and clearances could

A neutral ship and stores are insured *at and from* an enemy's port, and an embargo is there laid on by the enemy. This is an arrest of princes.—And if the embargo continue, the insured may abandon and recover as for a total loss.

Rotch v. *Edie*, 6 T. R. 425, sup. 25.

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if the risk be commenced before the arrest, the insured may abandon, upon an arrest even in the port of loading. *Le Guidon*, however, (ch. 9, art. 6,) contains these words. "Si le prince arrête le navire, comme s'il s'en voulouit servir; s'il avoit affaire de portion ou de toute la marchandise; s'il ne veut permettre aux navires de sortir qu'en flotte, ou rédoublement d'équipage, ou s'il prévoyoit à plus grand danger les arrestans pour quelque temps, l'assureur n'est en aucune indemnité quand telle chose avient dedans le même port, pour ce que ce sont *des dangers de la terre*, procedans du vouloir du prince."—Upon this passage of *Le Guidon*, *Valin* (ubi sup.) observes, that whatever may be the King's motive for stopping the departure of a ship, the insurer has no right to abandon, but must wait till the King has withdrawn his orders, and it may be considered as one of the extraordinary and unforeseen events by which a voyage may be prolonged beyond its usual time. Lord *Mansfield*, in *Goss* v. *Withers*, 2 *Bur.* 696, seems to have adopted the doctrine as laid down by *Roccus*, and followed by *Pothier* and *Emerigon*; namely, that the insured may abandon in the case of a mere arrest, or an embargo, by any prince. Vid. post. chap. 14, on abandonment.

could be obtained, an embargo was laid on all veſſels in thoſe ports. The *Adelaide* was brought back to *L'Orient*, the periſhable ſtores of all three ſhips were ſold, and the ſhips themſelves, with the reſt of the ſtores, remained at *L'Orient* under the embargo, which ſtill continued on all ſhips, deſtined for long voyages. The *Adéle* and *Victor* had entered outward upon their reſpective voyages, when the embargo came; and that alone prevented them from ſailing. Notice of abandonment was given to the underwriters, on the 27th of *February* 1793, and a total loſs claimed, and the ſame repeated in *Auguſt* following. The plaintiff, who then reſided in *England*, was a ſubject of the United States of *America*, and formerly reſided ſeveral years in *London*, but, for ſome years previous to the inſurances in queſtion, had dwelt at *L'Orient*, and was jointly concerned in the Southern whale fiſhery with Mr. *Berard* a native of *France*, reſident at *L'Orient*, and whoſe intereſt was ſeparately inſured.—On the trial of the cauſe a ſpecial caſe, ſtating the above facts, was reſerved for the opinion of the court; and it was contended on the part of the underwriters,—1ſt, That an embargo at the loading port to which the ſhip belonged, and where the inſured owed a temporary allegiance to the governing power, was not a riſk within the meaning of the policy, becauſe like ſea-worthineſs, it is a condition neceſſarily implied in the contract of inſurance, that the ſhip may legally ſail from the loading port. 2dly, That there was no loſs in regard to the ſubject-matter of the inſurance, which is on the ſhip, &c. 3dly, That the plaintiff had no right to abandon as for a total loſs, under the particular circumſtances of this caſe.—The court, however, determined in favour of the plaintiff on all theſe points.—As to the *firſt*, they held, that the terms of the policy were ſufficiently large to extend to this caſe; and that it was incumbent on the defendant to have ſhewn ſome caſe in which it was otherwiſe decided; but all the authorities, both *Engliſh* and foreign, were in favour of the plaintiff. That the plaintiff was not an alien enemy, but a native of *America*, then reſident in *England*, and therefore under no diſability

diſability to ſue in this caſe, and the conſequence of allowing this objection, would be to render it illegal to inſure the property of a neutral, in an enemy's port. As to the *ſecond* point, the court held that as the inſurance was not only on the ſhip, but on the ſtores, proviſions, and fiſhing tackle, which were loſt to the plaintiff; and as the voyage was loſt in conſequence of the detention of the ſhips, this was a loſs within the policy, and a very different caſe from that of *Robertſon* v. *Ewer*, (*a*) to which it had been compared.—Upon the laſt point, the court was of opinion, that the plaintiff had as much right to abandon in this caſe, as in the caſe of a capture by an enemy; and for this the doctrine of Lord *Mansfield* in *Goſs* v. *Withers* (*b*) was much relied on.

A ſeizure, after a ceſſation of hoſtilities, is an arreſt of princes.

If a ſhip be ſeized after a ceſſation of arms and preliminary articles of peace are ſigned, this ſhall not be deemed a capture, but only an arreſt of princes.

An *Engliſh* ſhip is ſeized by the *Spaniards*, and converted by them into a ſhip of war: But it appearing that this was after a ceſſation of arms, and preliminary articles of peace ſigned, and the ſhip having been reſtored; this was held not to be a capture, but only a detention of princes.

As, where the plaintiff had cauſed himſelf to be inſured "on the *Prince Frederick* from *Vera Cruz* to *London*, *in-*"*tereſt or no intereſt*, free of average, and without bene-"fit of ſalvage."—The ſhip was afterwards ſeized by order of the Viceroy of *Mexico*, and the *Spaniards*, having taken out the *South Sea* Company's arms, and made ſeveral alterations in her, turned her into a ſhip of war, and ſent her as commodore with a ſquadron of men of war to the *Havannah*, there being a war at that time between *England* and *Spain*; and *Gibraltar* was actually beſieged by the *Spaniards*.—In an action on the policy, (*d*) the defendants proved the ſigning of the preliminary articles of peace before the ſeizure of the ſhip, and therefore inſiſted that this ſeizure did not alter the property, and conſequently the defendants were not liable: For if the property

Spencer v. *Franco*, at N. P. *December* 1736, *Beawes* 4th ed. p. 316. (*e*)

(*a*) 1 T. R. 127, inf. c. 17, § 5.—(*b*) 2 *Bur.* 583, inf. c. 14, § 2.—(*c*) This caſe, which is found in the 4th edition of *Beawes* but not in the 5th, is ſo imperfectly reported that it cannot be much relied on as an authority: Yet, being cited by Lord *Mansfield* in the caſe of *Hamilton* v. *Mendes*, 2 *Bur.* 1211, I thought it ought not to be paſſed unnoticed here.—(*d*) The plaintiff it may be preſumed declared only upon a loſs by *capture*.

erty was not altered, this inſurance, made by the plaintiff without intereſt, could not bind; as nothing came within the policy but a total loſs: And though there be thoſe general words, "*reſtraint or detainment of princes.*" —Lord C. J. *Hardwicke* declared that a war might begin without an actual declaration or proclamation, as in this caſe, by laying ſiege to *Gibraltar*; that as a war might begin by hoſtilities only, ſo it might end by a ceſſation of arms; and theſe preliminary articles being ſigned before the ſeizure of the ſhip, and there being a ceſſation of arms, he thought the taking of the ſhip afterwards not to be a taking by enemies, unleſs the jury took the capture to begin from the time the *South Sea* arms were taken out, which was before the articles: That ſuppoſing the ſhip not taken by enemies, whether the detention for near a year was, in this ſort of policy, viz. *intereſt or no intereſt*, a detention within the policy; or whether in ſuch policies, the inſurers are ever liable but in caſe of a total loſs; and if ſo, the ſhip being afterwards reſtored, he directed the jury to find for the defendants, which they accordingly did.

Sect. 6.

Of Loſs by Barratry.

Barratry defined.

BARRATRY, (which is derived from the *Italian* verb *barratrare*, to cheat,) may be defined to be, any ſpecies of fraud, knavery, deceit, or cheating, committed by the maſter or mariners, whereby the owners ſuſtain an injury: As by running away with the ſhip, wilfully carrying her out of the courſe of the voyage preſcribed by the owners, ſinking or deſerting her, embezzling the cargo, ſmuggling, or any other offence whereby the ſhip or cargo may be ſubjected to arreſt, detention, loſs, or forfeiture: (*a*) Barratry, in ſhort comprehends every fraud that may be committed by the maſter or mariners againſt the owners; and

(*a*) Vid. *Saloucci* v. *Johnſon*, ſup. 301.

and therefore, where the breach aſſigned in the declaration on a policy was, the loſs of the ſhip, "by the *fraud and negligence* of the maſter," it was determined that this was a ſufficient averment of a loſs by barratry. (*a*)

Whether inſurance againſt barratry ought in all caſes to be permitted.

At *Amſterdam*, *Hamburgh*, *Middleburgh*, and ſome other maritime towns, inſurers are, by *poſitive law*, made reſponſible for the barratry of the maſter and mariners. (*b*) At *Rotterdam* the owners of ſhips are prohibited from inſuring againſt the barratry of the maſter whom they themſelves appoint. But they are permitted to inſure againſt his neglect, againſt the barratry of the ſailors, and of ſuch maſter as may ſucceed to the command in foreign parts without their knowledge, upon the deceaſe or abſence of the maſter originally appointed. (*c*)

Lord *Mansfield* thought it extraordinary that barratry ſhould ever have crept into inſurances, and ſtill more that it ſhould have continued in them ſo long; thus making the underwriter become inſurer of the conduct of the captain whom he does not appoint, and cannot diſmiſs, to the owners who can do either. (*d*)

Roccus (*e*) holds that the inſurer cannot be made liable for barratry, if the inſured be the owner of the ſhip; but if he only *charter* the ſhip, he may inſure againſt barratry; becauſe in that caſe, the owner of the ſhip appoints the maſter. But where the owner of the goods appoints the maſter, it is holden that he cannot be inſured againſt barratry. (*f*)

In *France* the inſurer was formerly anſwerable, *ipſo jure*, for the barratry of the maſter. (*g*) But, by the ordinance of the marine, (*h*) this liability is confined to caſes, where the policy expreſsly includes barratry; and *Emerigon* (*i*) even inſiſts that the owner of the ſhip cannot be inſured

(*a*) R. *Knight* v. *Cambridge*, 1 *Str.* 581, 2 Lord *Ray.* 1349, inf. ch. 17, § 2.—(*b*) 2 *Mag.* 73, 130, 215.—(*c*) Vid. *Roccus*, n. 27, *Emerig.* tom. 1, p. 370.—(*d*) 1 T. R. 330.—(*e*) h. t. n. 44.—(*f*) Quando navarcus poſitus eſt à domino mercium, tunc aſſecuratus ſibi debet imputare quod talem præpoſitum elegerit, et aſſecurator non tenetur. *Caſaregis*, diſ. 10, n. 14; diſ. 1, n. 75.—(*g*) Vid. *Le Guidon*, ch. 5, art. 6, ch. 9, art. 8, 12.—(*h*) h. t. art. 28.—(*i*) Vol. 1, p. 369.

inſured againſt barratry of the maſter, becauſe he is himſelf anſwerable, according to the rule of the *Roman* law, (*a*) for the conduct of the maſter whom he employs; and if the owner be himſelf anſwerable to third perſons for the barratry of the maſter, he cannot, *as inſured*, throw this burthen on the inſurer, who would have an immediate remedy againſt him, *as owner*, to recover back the ſame loſs; a circuity of action which the laws of no country would endure.

Upon the ſame principle *Emerigon* alſo holds that if the captain be commiſſioned to diſpoſe of an adventure on board, the inſurer of ſuch adventure ſhall not be anſwerable for the loſs of it, occaſioned by the fault of the captain; for this would be, to make the inſurer anſwerable to the inſured for the faults of his own agent. (*b*)

But the objections to the policy of permitting inſurances againſt barratry, in the caſe of the *owner of the ſhip*, however well founded, do not apply to the inſurance of goods in a *general ſhip*, which carries the goods of every man who chooſes to put them on board; for, in that caſe, the owner of the goods does not appoint the maſter, nor has he any control over either him or the ſhip. It is probable that caſes like this, firſt gave birth to the practice of inſuring againſt barratry; and that this, in proceſs of time, was indiſcriminately introduced into all policies.

But even in the caſe of a *particular ſhip*, freighted entirely by a ſingle perſon, it may in general be preſumed that if the inſurer does not know the maſter, or at leaſt his character, it is his own fault, as every policy ſpecifies the maſter; but then it is generally provided that any other perſon, at the election of the inſured, may go as maſter; and by permitting this clauſe to ſtand in the policy, the inſurer waves all perſonal knowledge of the maſter, and therefore no objection can fairly be made of the want of ſuch knowledge.(*c*)

And

(*a*) Omnia facta magiſtri debet præſtare qui eum præpoſuit ff. l. 1. § 5, de exercit. act. Ex delicto cujuſvis eorum qui navis navigandæ cauſâ in nave ſunt datur actio in exercitorem, id. § 2.—(*b*) *Emerig.* tom. 1, p. 370.—(*c*) Vid. *Roccus*, h. t. n. 27. *Cowp.* 153. Vid. ſup. 221.

And though barratry cannot properly be called a peril of the ſea, becauſe it does not ariſe *ex marinæ tempeſtatis diſcrimine*, yet it is a riſk, and a very great one, incident to ſea voyages, becauſe merchants are obliged to confide their ſhips and merchandize to the care of mariners who may ſometimes ſo far forget their duty, as to betray the great truſt repoſed in them. Unleſs, therefore, the merchant could be protected by inſuring againſt this riſk, few men of ſmall capitals would expoſe themſelves to it. For this reaſon the law, with us, permits even the owner of the ſhip to be inſured againſt the miſconduct of the captain and crew, though they are his own agents, and the perſons of his own choice.

The captain may be inſured againſt the barratry of the ſailors.

If the captain be the inſured, no agreement on the part of the inſurers can make them liable for barratry committed by himſelf; (*a*) but they may be liable, in ſuch caſe, for the barratry of the ſailors, in which he has no part. (*b*)

Still, however, it muſt be owned that caſes ſometimes occur which tempt one to think that it might, perhaps, be the wiſeſt policy to impoſe ſome reſtraint upon unqualified inſurances by *owners of ſhips*, againſt this ſpecies of riſk. It would at leaſt have the effect of making them more circumſpect in the choice of the perſons to whom they confide ſo great a charge.

What ſhall be deemed barratry.

Valin (*c*) and *Pothier*, (*d*) (adopting the doctrine of *Le Guidon*,) (*e*) hold that barratry comprehends every fault, either of the maſter or mariners, by which a loſs is occaſioned, whether ariſing from fraud, negligence, unſkilfulneſs, or mere imprudence; and in this ſenſe it ſeems to be underſtood in the *French* ordinance of the marine. (*f*)

A deviation not proceeding from fraud, is not barratry.

But with us, no fault of the maſter or mariners amounts to barratry, unleſs it proceed from an intention to defraud the owners of the ſhip. (*g*) Therefore if the maſter,

(*a*) *Le Guidon*, ch. 15, art. 4; *Valin*. h. t. art. 27, p. 75; *Pothier*, h. t. n. 65.—(*b*) *Emerig*. tom. 1, p. 371.—(*c*) On art. 28, h. t. tom. 1, p. 79.—(*d*) h. t. n. 65.—(*e*) Ch. 5, art. 6, ch. 9, art. 1, 8.—(*f*) h. t. art. 28.—(*g*) Non omnis navarci culpa eſt barrataria, ſed ſolum tunc ea dicitur, quando committitur cum præexiſtenti ejus machinatione, et dolo præordinato ad caſum. *Caſaregis*, diſ. 1, n. 77.

maſter, from *ignorance, unſkilfulneſs*, or from any motive which is not *fraudulent*, depart from the proper courſe of the voyage; this will be a deviation which will avoid the policy, but it will not amount to barratry.

In a voyage from *London* to *Jamaica*, the captain loſes his reckoning; and when he diſcovers his ſituation, inſtead of ſteering directly for *Jamaica*, bears up for an iſland out of that courſe: This is a deviation, but being without any fraudulent intention, is not *barratry*.

Pbynn v. *Roy. Ex. Aſſur.* 7 T. R. 505.

Thus:—Goods were inſured from *London* to *Jamaica*, and it appeared that the captain's inſtructions were to proceed immediately to *Jamaica*: But after the ſhip had cleared the *Channel*, ſhe was carried by currents and other cauſes, out of her reckoning, till ſhe was found to be between the *Grand Canary* and *Teneriffe*. From this ſituation her direct courſe to *Jamaica* was to the ſouth-weſt, inſtead of which, the captain bore up for *Santa Cruz* to the northweſt about 30 miles, where ſhe came to an anchor. There, an embargo was laid upon her; ſoon after which, news arrived of war having been declared between *Spain* and *Great Britain*, and the ſhip and cargo were ſeized and condemned as prize.—In an action on the policy, the declaration contained two counts; one for a loſs by *capture*, the other for a loſs by *barratry*. And it was contended on the part of the plaintiff, that he was neceſſarily entitled to recover on one count or the other: On the firſt, if there was no deviation; or, admitting that the ſhip's going to *Santa Cruz* inſtead of proceeding to *Jamaica*, after the captain knew with certainty where he was, was a deviation, ſtill it was a wilful deviation by the captain, againſt his inſtructions, merely to procure a temporary refreſhment, and no benefit to the owners, and therefore an act of barratry.—Lord *Kenyon*, who tried the cauſe, ſaid, that it could not be barratry, without a fraudulent purpoſe in the captain at the time; and with that direction he left it to the jury, who found "that "the captain's going to *Santa Cruz* was a deviation, and "was owing either to ignorance or ſomething elſe, *but* "*that it was not fraudulent;*" and they accordingly found for the defendants.—Upon a motion for a new trial, the court were clearly of opinion that there muſt be *fraud* to conſtitute barratry; and as the jury had expreſsly negatived fraud, there could be no barratry.—Mr. Juſtice *Lawrence* ſaid he knew of no caſe in which it is ſaid that the act of the captain is barratry, merely becauſe it is againſt

againſt the intereſt of the owners; it muſt be done with a *criminal intent*: That, in this caſe, the jury having negatived fraud, had negatived criminality in the captain; and therefore this was not a barratrous deviation.

Whether barratry may be committed by the ſeamen without the participation, or againſt the will, of the captain.

In *France*, if by the policy the inſured be protected againſt the barratry of the *maſter*, the underwriters are anſwerable for the miſconduct of the *mariners* alſo; becauſe the word maſter (*patron*) comprehends all the perſons on board who are in the ſhip's pay. (*a*) Our policies are more explicit, and diſtinctly ſpecify barratry of the maſter and *mariners*. I ſhould conceive, therefore, that with us, as in *France*, the mariners may commit barratry, without the concurrence of the maſter, or againſt his will. In the following caſe, however, Lord C. J. *Lee*, at *niſi prius* held, that a deviation to which the maſter was compelled by a very daring act of violence and diſobedience on the part of the ſeamen, did not amount to barratry, becauſe the ſhip was not actually *run away with in order to defraud the owners*.

A deviation, occaſioned by the diſobedience of the ſeamen, has been holden not to be barratry, unleſs it be done with intent to defraud the owners.

A letter of marque having orders in caſe ſhe ſhould take a prize, to ſend it home, and proceed on her voyage; but the maſter being compelled by the ſailors, returns back with the prize: This is not barratry.

Elton v. *Brogden*, 2 *Str.* 1264. Sup. 413.

That was the caſe of a letter of marque, inſured for a voyage "from *Briſtol* to *Newfoundland*."—She ſailed with expreſs orders that, if ſhe ſhould take any prize, ſhe ſhould nevertheleſs proceed on her voyage, and that ſome hands ſhould be put on board the prize, and ſent with it to *Briſtol*.—A prize was taken in the courſe of the voyage; and the captain ordered ſome of the crew to carry the prize to *Briſtol*, while he proceeded on his voyage: But the crew oppoſed him, and inſiſted on his going back, though he acquainted them with his orders; and he was forced to ſubmit, and on his return, his own ſhip was taken.—The underwriters inſiſted that this was a deviation which diſcharged them.—The plaintiff contended that it was *barratry*.—But Lord C. J. *Lee* was of opinion that

(*a*) Les aſſureurs ne répondent pas des méfaits des mariniers, à moins que par la police ils ne ſoient chargés de la *barraterie du patron*. Le mot *patron* comprehend ici tous ceux qui ſont aux gages du navire. *Emerig.* t. 1, p. 381, 2. Vid. *Valin*, t. 2, p. 3.

that it did not amount to barratry, as the ſhip was not run away with *in order to defraud the owners:* Neither was it a caſe of wilful deviation, but of deviation occaſioned by the force upon the maſter which he could not reſiſt, and therefore excuſed by the neceſſity. The inſurers were therefore held to be anſwerable, and the plaintiff had a verdict.

And yet if the captain cruiſe in queſt of prize, contrary to his orders, this is barratry, tho' done for the benefit of the owners as well as the crew.

The learned judge who tried this cauſe, and who was in general a maſter of all the learning of his time on the ſubject of inſurance, ſeems to have thought that nothing ſhort of running away with the ſhip, with intent to defraud the owners, amounted to barratry. What the ſeamen did in that caſe was but one degree ſhort of ſuch a crime. In the following caſe which we have already had occaſion to mention, the conduct of the maſter was held to be barratry, though certainly much more venial than that of the ſailors in the above caſe.

Moſs v. *Byrone*, 6 T. R. 379. Sup. 195.

A ſhip was chartered for a voyage from *Liverpool* to the *Bahamas* and back, and on her return from the *Weſt Indies*, letters of marque were taken on board, merely to entice ſeamen to enter, but without the neceſſary documents to give them validity, *and without any intention of cruiſing in queſt of prizes;* and it was a part of his written inſtructions, before he ſailed, to proceed to *Liverpool* with all expedition. A few days after the ſhip ſailed, however, the captain, with the concurrence of the majority of the ſeamen, determined to cruiſe for prizes; and he ſoon fell in with an *American*, whom he plundered and afterwards diſcharged. He then cruiſed for ſome days out of the courſe of the voyage, and captured a ſhip of the enemy which he ſent to *Bermudas*, where he followed her himſelf, and there libelled her as prize in the court of admiralty, in the name of himſelf and *his owners*. But during his ſtay there his ſhip was ſtranded, and the cargo loſt. He directed that the cruiſing ſhould not be mentioned in the log-book. In an action to recover as for a loſs by barratry, it was contended on the part of the underwriters, that this could not be barratry, inaſmuch as the act of the captain, however reprehenſible in other reſpects,

reſpects, was done with a view to benefit, not to prejudice, his owners. But the court held this to be barratry; and that the ſtopping and plundering the *American* ſhip was of itſelf an act of barratry in the maſter, independent of his taking the prize, this being contrary to his duty to his owners, and to their prejudice; becauſe, by the charter-party, they had ſtipulated that the ſhip ſhould ſail directly to *Liverpool*, and they were therefore liable for any damage that might happen in conſequence of any wilful deviation. And though the captain might conceive that what he did was for the benefit of the owners; yet, if he acted contrary to his duty to them, it was barratry.

Though the captain conceive that what he does is for the benefit of the owners; yet, if it be contrary to his duty to them, it is barratry.

Barratry can only be committed by the maſter and mariners, by ſome act contrary to their duty, in the relation in which they ſtand to the owners of the ſhip. It is therefore an offence againſt them, and conſequently an owner himſelf cannot commit barratry. He may, by his fraudulent conduct, make himſelf liable to the owner of the goods on board, but not *for barratry*. Neither can barratry be committed againſt the owner, *with his conſent*; for though he may be liable for any loſs or damage occaſioned by the miſconduct of the maſter, to which he conſents, yet this is not barratry. Nothing is more clear than that a man can never ſet up as a crime an act done by his own direction or conſent. Theſe points will be found fully eſtabliſhed in the two following caſes.

Barratry can only be committed againſt the *owners of the ſhip*, and therefore it cannot be committed *with their conſent*.

In the firſt of theſe caſes it appeared that a ſhip was advertiſed to go to *Marſeilles*, goods were ſhipped on board her, and the maſter ſigned a bill of lading, whereby he undertook to go ſtraight to that place, and the goods were inſured, "from *Falmouth*, (where they were to be taken in,) to *Marſeilles*." Before the ſhip departed from the port of *London*, another advertiſement was publiſhed for goods to *Genoa*, *Leghorn*, and *Naples*, and the plaintiff's agent was told that it was intended to go to thoſe ports firſt, and then come back to *Marſeilles*; but he inſiſted that his bargain was to go directly to *Marſeilles*; and he would not conſent to let her paſs by *Marſeilles* or alter his inſurance.—The ſhip, however, did paſs by *Marſeilles*; and after delivering her cargo at the other ports,

A ſhip is engaged to carry goods ſtraight to *Marſeilles*; but inſtead of going thither direct, ſhe goes firſt to *Genoa* and *Leghorn*: This being done by the authority of the owner, and for his benefit, and no fraud being intended; it is not barratry.

Stamma v *Brown*, 2 *Str.* 1173.

ports, ſet out on her return for *Marſeilles* with the plaintiff's goods; but, in her voyage thither, was blown up in an engagement with a *Spaniſh* ſhip of war. The plaintiff declared as for a loſs by the barratry of the maſter.—Lord C. J. *Lee* told the jury that this voyage, being againſt the expreſs agreement to proceed ſtraight to *Marſeilles*, ſeemed to be more than a common deviation, as it was a formed deſign to deceive the plaintiff; and compared it to the caſe of ſailing out of port without paying the duties, whereby the ſhip was ſubjected to forfeiture, which had been holden to be barratry.—The jury, after ſtaying out ſome time, returned and aſked the Chief Juſtice, whether, if the maſter was to have no benefit to himſelf by paſſing by *Marſeilles*, and went only to the other places firſt, for the benefit of his owners, that would be barratry; and the Chief Juſtice anſwering, No, they found for the defendant.—On a motion for a new trial, the court, after argument, were unanimouſly of opinion that the verdict was right: For the maſter had acted conſiſtently with his duty to his owners, and the plaintiff's agent knew of the intended alteration, before the goods were put on board, and might have refuſed to ſhip them, or have altered the inſurance: That to make it barratry there muſt be ſomething of a criminal nature, as well as a breach of the contract; and that here, the breach being aſſigned only on the *barratry*, was not ſupported by the evidence.

After bills of lading are ſigned by the captain, and delivered to the owner of goods, the captain, at the inſtance of the owner, ſigns new bills of lading, changing the deſtination of the ſhip; and by this contrivance the goods are diſpoſed of for the uſe of the owner of the ſhip, and in fraud of the owner of the goods. This being done with the concurrence

The other was the caſe of an inſurance effected on behalf of *Hague*, before he became bankrupt, on goods on board the *Rachette* from *London* to *Rochelle*. In an action on this policy it appeared that the maſter, *by the inſtigation and direction of* Le Grand, *the owner of the ſhip, went with the ſhip and cargo to* Bourdeaux, *inſtead of* Rochelle, *where the cargo was ſold by the agent of* Le Grand: That a petition was preſented by the inſured to the admiralty of *Guienne*, ſtating that *Le Grand*, partner in a houſe at *Rochelle*, being in *London* with his ſhip, and in want of a cargo to return home, applied to *Hague*, who agreed to ſupply him with goods, which were loaded on board the ſhip, for account of *Le Grand*: That as *Hague* did not know the houſe of *Le Grand*, it was agreed between

tween him, *Le Grand*, and the captain, that the bills of lading ſhould not be delivered to *Le Grand* but at *Rochelle*, after he ſhould have paid the amount to the agent of *Hague*, in good bills, and, in default, that the goods ſhould be received by *Hague*'s agent for his account, free from freight, &c.: That the captain accordingly delivered bills of lading to *Hague*, who forwarded them, together with the contract, to his agent at *Rochelle*, with orders to receive the goods on the arrival of the ſhip, or deliver them to *Le Grand* if he ſhould fulfil his agreement. That, upon the ſhip's arrival at the harbour of *Rochelle*, *Le Grand* went on ſhore, got ſecretly into the town, where, having conſulted with his partners how to elude the precautions taken by *Hague*, returned on board, and got the captain fraudulently to ſign other bills of lading, by which he reſerved to himſelf the liberty of putting into *Rochelle* or *Bourdeaux*; and by means of the falſe bills of lading, and by the contrivance of *Le Grand*, the goods were there put into the hands of *Le Grand*'s agent. That *Hague*'s agent on hearing of this, applied to the houſe of *Le Grand*, who gave him bills for the whole amount, but which were afterwards diſhonoured; and thereupon the agent attached the cargo in the hands of the ſeveral perſons who held it: That the houſe of *Le Grand* having delivered a falſe account to their creditors, a releaſe was granted them from all attachments and executions, confirmed by the Parliament of *Paris*, with an injunction to all perſons arreſting their goods to reſtore them: That, in conſequence of this petition, the court of admiralty at *Bourdeaux* decreed *that the captain was guilty of barratry*, for having ſigned falſe bills of lading, in order to change the voyage, and carry away the goods; for which they condemned him to the gallies for life: They alſo declared *Le Grand* to be an *accomplice in the ſaid barratry of the maſter*, and guilty of robbery in cauſing the ſhip to be brought into *Bourdeaux*, and condemned him to the gallies for five years: That they likewiſe condemned the captain and *Le Grand* to pay the value of the goods, with the charges, &c.—Upon this caſe it was contended on the part of the plaintiff, that the fraudulent conduct of the captain

of the owner, is not barratry.

Nutt and others, aſſignees of *Hague* v. *Bourdieu*, 1 T.R. 323.

captain amounted to barratry.—But the court were clearly of opinion that this could not be barratry, and that the plaintiff ought not to recover.—Lord *Mansfield* ſaid,—"The ſentence of the *French* court of admiralty, which declared the maſter and owners to have been guilty of barratry, is entirely out of the queſtion: For, though it was a moſt righteous judgment, yet it was no part of the conſideration of that court, what was meant by barratry in an *Engliſh* policy. Their idea of barratry was manifeſtly different from the conſtruction put upon that word in our own courts; for they had found the *owner* guilty of barratry, which was entirely repugnant to every definition of barratry which had ever been laid down in an *Engliſh* court of juſtice:—The point to be conſidered is, whether barratry, in the ſenſe in which it is uſed in our policies, can be committed againſt any but the owners of the ſhip. It is clear beyond contradiction that it could not; for barratry is ſomething contrary to the duty of the *maſter* and *mariners*, the very terms of which imply that it muſt be in the relation in which they ſtand to the *owners of the ſhip*. An owner, therefore, cannot commit barratry. He may make himſelf liable by his fraudulent conduct to the owner of the goods, but not as for barratry. And, beſides, barratry cannot be committed againſt the owner *with his conſent*: For though the owner may become liable for a civil loſs, by the miſbehaviour of the captain, if he conſented, yet that is not barratry. Barratry muſt partake of ſomething criminal, and muſt be committed *againſt the owner*, by the maſter or mariners."

If the ſame perſon be both owner and maſter, he cannot commit barratry.

If the maſter of the ſhip be alſo the owner, he cannot commit barratry, becauſe he cannot commit a fraud againſt himſelf. And even where he has mortgaged the ſhip, and the legal title is in another, and he has only the equity of redemption, yet he is ſtill ſo far the owner that he cannot commit barratry.

The owner mortgages the ſhip, and acts as maſter while he is poſſeſſed of the equity of redemption: He cannot commit

Thus:—An inſurance was made on a voyage "From "*London* to *Marſeilles*, and from thence to ſome port in "*Holland*."—The ſhip ſailed to *Marſeilles*, and there the maſter, inſtead of purſuing his voyage to *Holland*, ſailed to

to the *Weſt Indies*, where he ſold the ſhip, and died inſolvent.—An action at law being brought by the inſured for a loſs occaſioned by the *barratry of the maſter*, the underwriter brought his bill in Chancery for an injunction to ſtay the proceedings at law; ſuggeſting that *the maſter was alſo the owner of the ſhip*; that he had, before the voyage, entered into a bottomry bond to the defendant for 200 l.; and though he had afterwards, by a bill of ſale, aſſigned over his intereſt in the ſhip to the defendant as a ſecurity for the 200 l., yet, it was inſiſted that, in equity, the captain was ſtill to be conſidered as the owner of the ſhip, though in a court of law, the legal title would be looked upon to be in the defendant; and that the owner of the ſhip could not, either in law or equity, be guilty of barratry. The matters of fact being admitted, an injunction was moved for, on the principle that a mortgagor is to be conſidered in equity as the owner of the thing mortgaged, and that the maſter being owner, could not be guilty of barratry. Lord *Hardwicke* C. J. granted the injunction.—He ſaid,—"Barratry is an act of wrong done by the maſter againſt the ſhip and goods; and this being the caſe of a ſhip, the queſtion will be, Who is to be conſidered as the owner? Several caſes might be put where barratry may be aſſigned as the breach of an inſurance; and barratry or not, is a queſtion properly determinable at law: But in this caſe it is not ſo; for courts of law will not conſider a mortgagor as having any right or intereſt in the thing mortgaged; and a man may frequently come into equity for relief in reſpect of a part only of his caſe. It might, indeed, be conſidered at law, whether, what the maſter has done, whether he be owner or not, did not amount to a breach of the contract as maſter, and ſo to a barratry: It may likewiſe be ſo conſidered in this court. But at law a defendant cannot read part of a plaintiff's anſwer to a bill filed againſt him here: The whole anſwer muſt be read, which has often been a reaſon for this court to interpoſe by injunction upon a plaint at law; and conſidering the mixed nature of this caſe, I think an injunction ought to be granted."

barratry, being ſtill conſidered as owner.

Lewin v. *Sneſſo*, *Peſt.* Dict. vol. 1, p. 147.

Yet,

But a general freighter is conſidered as owner for the voyage; and a deviation without his knowledge, though with the conſent of the original owners, is barratry.

Vallejo v. *Wheeler, Cowp.* 143.

Yet, where a ſhip is let out to freight generally, the freighter is conſidered as the owner for that voyage; and a deviation for an illegal purpoſe, without the knowledge or conſent of the freighter, will be barratry, though it be with the conſent of the original owner. This will appear from the following caſe.

An inſurance was made in the common form on goods, "From *London* to *Seville*, with liberty to touch at any "ports or places, &c."—In an action on the policy, the loſs was alleged different ways in the declaration; *firſt*, that the ſhip, by ſtorms and perils of the ſea, was forced to go to *Dartmouth* to be repaired; and that afterwards a further loſs happened by ſtorms, &c.: *ſecondly*, that it happened by ſtorms, &c. in the voyage generally; and *thirdly*, by the *barratry of the maſter*.—At the trial it appeared, that the ſhip was put up as a general ſhip from *London* to *Seville*, and was let to freight by one *Willes* to *Darwin*. (*a*) That it is the courſe for veſſels going on the voyage, to ſtop at ſome port in the weſt of *Cornwall*, to take in proviſions. That this ſhip having taken her cargo on board, ſailed from *London* to the *Downs*, and while ſhe lay there, all the other ſhips bound to the weſtward bore away; but ſhe ſtaid till the night after, and then ſailed to *Guernſey*, which was out of the courſe of the voyage: That the captain went there for his own convenience, to take in brandy and wine on his own account, after which he intended to proceed to *Cornwall*. That the night after ſhe quitted *Guernſey* ſhe ſprung a leak, which obliged her to put into *Dartmouth*. When ſhe was refitted ſhe ſailed again, and proceeded for *Helford* in *Cornwall*, where it was always intended ſhe ſhould ſtop and take in proviſions; but in her way, ſhe received further damage, and at her arrival was totally incapable of

(*a*) Mr. *Cowper*'s report of this caſe ſtates *Darwin* to have chartered the ſhip to *Brown* the captain. Mr. Juſtice *Buller* in 1 T. R. 330, ſays that the error ſhould be corrected by ſtating that the ſhip was chartered by *Brown* to *Darwin*, and not by *Darwin* to *Brown*. But it appears by the ſubſequent part of the report that *Darwin* freighted the ſhip from *Willes*.

of proceeding on the voyage, and the goods insured were much damaged.—It was attempted, on the part of the defendant, to prove that the voyage to *Guernsey* was on account of *Willes*, the owner of the ship, and that the goods taken on board there were his property: But this evidence went little further than information and belief, except that when the ship arrived at *Helford* the wine was delivered into his cellar.—Mr. Justice *Ashurst*, who tried the cause, told the jury that if the going to *Guernsey* was without the knowledge of *Darwin*, it was barratry; and they ought to find for the plaintiff: But if done with his knowledge, then it was not barratry: And if they should be of opinion that it was without the knowledge of *Darwin*, then, he desired them to say whether they thought it was with the knowledge of *Willes* or not. (*a*) The jury found for the plaintiff, and said they thought the going to *Guernsey* was without the knowledge of *Darwin*, whom they looked upon to be the owner, but they thought it was with the knowledge of *Willes*.—Upon a motion for a new trial, two questions were made: *First*, Whether the conduct of the master, in going to *Guernsey*, for the purpose, and under the circumstances, above stated, was barratry: Supposing this to be barratry, then *secondly*; whether, to entitle the plaintiff to recover, the loss must not have happened during the time of the barratry, or have been occasioned immediately by the act of barratry: Here the goods were not seized for smuggling, nor did the loss happen till after the act of barratry.—The court, after two arguments, were unanimously of opinion that this was barratry.—They said that if a ship be let out generally to freight, the freighter is owner for that voyage; but if there be only a covenant to carry goods, the owner

(*a*) There seems to be some error in this part of the report. The first part of the direction of the learned Judge *takes it for granted* that *Darwin* was the owner. If so, it could not be material to inquire whether the deviation was with, or without, the knowledge of *Willes*. It would seem from the finding of the jury, that it had been left to them to say which of the two was the owner.

owner of the ſhip would have the direction of her, and the hiring of the maſter and mariners. That though *Willes* was originally the owner, and not being the inſured here, every thing relating to him might be laid out of the caſe, and that the jury, therefore, did right in conſidering *Darwin* as owner *pro hac vice*: That *Darwin* being the freighter, and the owner of the goods on board, any fraud committed on the owner, muſt be committed on him: That the maſter had agreed to go on a voyage from *London* to *Seville*; *Darwin* truſted he would ſet out immediately; inſtead of which he went on an iniquitous ſcheme, totally diſtinct from the purpoſe of the voyage to *Seville*; that this was a cheat and a fraud on *Darwin*, and was therefore barratry; which is not confined to the running away with the ſhip, but comprehends every ſpecies of fraud, knavery, or criminal conduct in the maſter, by which the owners or *freighters* are injured; and whether the loſs happened in the act of barratry; that is, *during* the fraudulent voyage, or after, was immaterial; becauſe the voyage was equally altered, even though there was no other iniquitous intent. But, independently of this, the judges ſeemed to think that the loſs, in the preſent caſe, was ſuſtained *in conſequence* of the alteration in the voyage. The moment the ſhip was carried from her right courſe, it was barratry, and the loſs happened in conſequence. But ſuppoſing the loſs to have happened *afterwards*, the inſured, if not protected againſt the barratry of the maſter, would have loſt his inſurance by the fraud of the maſter; for it was clearly a deviation, and he could have no remedy againſt the underwriters for a loſs in conſequence of a deviation.

Though barratry muſt be ſtrictly proved; yet proof that the maſter committed barratry is *prima facie* ſufficient, without ſhewing *negatively*, that he was not owner, &c.

Though it is a maxim in law that fraud ſhall never be preſumed, but muſt be ſtrictly proved; and it is a rule in queſtions of inſurance, that he who charges barratry muſt ſubſtantiate it by concluſive evidence; (*a*) yet in the following

(*a*) Barataria crimen nunquam eſt præſumendum, ſed concludentiſſimè probandum. *Caſaregis*, diſc. 1, n. 60; diſc. 225, n. 99; diſc. 226, n. 6. Vid. *Emerig.* tom. 1, p. 372.

following caſe it was determined that proof of the maſter's having carried the ſhip out of the regular courſe of the voyage for fraudulent purpoſes of his own, is *primâ facie*, ſufficient to entitle the plaintiff to recover; without ſhewing negatively that he was not the owner, or that any other perſon was the owner, or that this was not done with the owner's conſent.

Goods were inſured on board the *Live Oak*, *Joſeph Rati* maſter, "at and from *Jamaica* to *New Orleans*."—In an action on the policy, there were two counts in the declaration; the firſt alleging a loſs by the barratry of the maſter; the ſecond by the perils of the ſea.—Upon the trial, it appeared that the ſhip was put up as a general ſhip at *Jamaica*, that ſhe ſailed on the voyage inſured in *May* 1783. That the plaintiff, amongſt others, ſhipped the goods in queſtion, and in *June* following, arrived in the mouth of the *Miſſiſippi*, which leads up to *New Orleans*, in *Spaniſh America*, at the diſtance of 35 leagues. When the captain had got thus far, he dropped anchor, and went in his boat up the river to *New Orleans*, and, on his return, without carrying the ſhip to her port of deſtination, ſtood away for the *Havannah*, after which he was never heard of. It appeared that he had a private adventure of negroes of his own on board, which there was reaſon for ſuppoſing he intended to diſpoſe of at *New Orleans*; but finding it difficult to do ſo on account of an interdiction by the *Spaniſh* government againſt the importation of them there, he went to the *Havannah* in queſt of a market for them. The defendants, without offering any evidence, inſiſted that, upon the plaintiff's own ſhewing, he could not recover. Upon the firſt count, there was no evidence to ſhew that the captain was guilty of barratry; for *non conſtat* that he was not himſelf the *owner* or *general freighter* of the ſhip; or if not, that he had acted contrary to the directions of the owner in going out of the original courſe; And as to the ſecond count, there was a clear deviation which diſcharged the underwriters.—Lord *Kenyon* who tried the cauſe, was of opinion that barratry was ſufficiently proved, and that therefore the plaintiff was entitled to recover on the firſt count, and

Goods are inſured from *Jamaica* to *New Orleans*, and the maſter anchors in the mouth of the *Miſſiſippi*, goes up to that place in his boat for a fraudulent purpoſe, and on his return, ſtands away for the *Havannah*: Proof of theſe facts is ſufficient evidence of barratry, without ſhewing negatively that the maſter was not *owner* or *general freighter*.

Roſs v. *Hunter*, 4 T. R. 33.

and the jury found accordingly.—Upon a motion for a new trial, the court were clearly of opinion that the evidence was ſufficient to ſupport the verdict. The ſhip was a general ſhip, of which *Rati* was proved to be *captain*, which is *primâ facie* evidence that he was not *owner*. There was no proof of his being owner; and if that fact were neceſſary to conſtitute the defence of the underwriter, the affirmative proof lay upon him. For the ſame reaſon, if *Rati* had been general freighter, that ought to have been proved by the defendant.—Mr. Juſtice *Buller* alſo held, that the very dropping of the anchor in the mouth of the *Miſſiſippi*, being with a fraudulent view, was an act of barratry.

Even dropping anchor with a fraudulent view, is an act of barratry.

If a ſhip be inſured for a term, *in any lawful trade*, and barratry be one of the riſks mentioned in the policy, the underwriters are anſwerable for barratry of the maſter by ſmuggling; for *lawful trade* in the policy means the trade in which the ſhip ſhall be employed by the owners, and not any unlawful commerce in which the captain may be engaged without their concurrence.

Though the words "*in any lawful trade*" be inſerted in the policy, ſtill the inſurer is liable, if the captain commit barratry by *ſmuggling on his own account*.

As, where a ſhip was inſured for twelve months, *in any lawful trade*, to commence on her ſailing from *Sunderland*; and *barratry of the maſter and mariners* was one of the perils ſet forth in the policy.—The declaration alleged, that the ſhip ſailed *in a lawful trade* from *Sunderland*, and afterwards ſailed on a voyage from *Oſtend* to *Sunderland*, but put into the port of *Shields*, where the maſter, *in a barratrous and fraudulent manner, without the knowledge or conſent of the owner*, did fraudulently and barratrouſly, import from *Oſtend*, a quantity of ſmuggled goods, whereby the ſhip became forfeited, and was ſeized.—To this the defendant demurred, and inſiſted that, as the inſurance only extended to loſſes which the ſhip might ſuſtain in a *lawful trade*; the underwriter could not be liable for any loſs occaſioned by an *unlawful trade*, whether it proceeded from the act of the maſter or owner; and that the barratry inſured againſt was ſuch as might happen in a lawful trade, as by deſerting, ſinking, or running away with, the ſhip.—But the court determined that if the owner conducted himſelf

Blankley v. *Winſtanley*, 3 T. R. 279.

with

with propriety, he was entitled to be indemnified againſt all the perils inſured againſt in the policy; and that the words "*any lawful trade*" in the policy, meant the trade in which the ſhip was employed *by the owners*.

The inſurer will not be liable unleſs the loſs happen during the voyage, tho' the barratry was committed before the voyage ended.

Every loſs muſt appear to be a direct and immediate conſequence of the cauſe to which it is aſcribed by the inſured. We have ſeen, however, in the caſe of *Vallejo* v. *Wheeler*, (*a*) that whether the loſs happen during the act of barratry, or after it, is immaterial. Yet, the following caſe will ſhow, that, if a loſs do not happen within the time preſcribed by the policy for the duration of the riſk, the inſurer will not be liable for it, though it be the undoubted conſequence of the act of barratry.

Lucyer v. *Offley*, 1 T. R. 252; Sup. 174.

A ſhip was inſured from *Hamburgh* to *London*; and it appeared that, in the courſe of the voyage, the maſter committed barratry, by ſmuggling on his own account, on the *Engliſh* coaſt; that on the 1ſt of *September* 1785 the ſhip arrived at her moorings in the *Thames*, where ſhe remained in ſafety till the 27th, when ſhe was ſeized for the ſmuggling above ſtated, and the owners, upon their petition, had leave to compound for a ſum of money.—Upon this caſe it was determined, that though, by the exciſe laws, the forfeiture attaches the moment the offence is committed, and the ſhip may be ſeized at any time afterwards, and that the barratry was committed *during the voyage*; yet, that the underwriters were not liable for this loſs; for the law of inſurance would be left unſettled, if the liability of the inſurers were to be continued for any other time than that preſcribed by the policy.

How barratry ſhall be puniſhed

The offence of barratry ſo miſchievous in itſelf, and ſo injurious to commerce, is puniſhable as a public offence, according to the degree of guilt of the offender, by every commercial ſtate in *Europe*.

in *France*.

In *France*, any fraud practiſed by the maſter or mariners, with or without the privity of the owners, and frauds committed by the owners themſelves, are, as we have already ſeen, accounted barratry, and are puniſhed with exemplary ſeverity. It appears by the caſe of

(*a*) Sup. 454.

of *Nutt* v. *Bourdieu*, (*a*) that the captain of a ſhip was ſentenced to the gallies for life for ſigning falſe bills of lading, in order to change the voyage and carry away the goods: And the owner, who was convicted of being an accomplice in this crime, and of robbery in cauſing the ſhip to be carried to a wrong port, and converting the goods on board to his own uſe, was ſentenced to the gallies for five years.

How offences of this nature are puniſhed by the laws of this country, will be ſhewn by the laſt ſection of the preſent chapter.

Sect. 7.

Of Loſs by average Contributions.

THE ſubject of average is a branch of marine law which does not properly make a part of the law of marine inſurances. But as inſurers, by the general words of moſt policies, are liable to indemnify the inſured againſt thoſe contributions which are denominated *general average*, the ſubject of average muſt often incidentally occur in the conſideration of partial loſſes; it will therefore be neceſſary, in this place, to take a curſory view of this ſubject, and of the regulations by which averages are generally underſtood to be governed.

Average what.

Average (*b*) is a term uſed in commerce to ſignify a contribution made by the owners of the ſhip, freight, and goods on board, in proportion to their reſpective intereſts, towards any particular loſs or expenſe ſuſtained for the general ſafety of the ſhip and cargo; ſo as that the particular loſer may not be a greater ſufferer than the owners of the ſhip and the other owners of goods on board. Thus, where the goods of a particular merchant are thrown overboard in a ſtorm to ſave the ſhip from ſinking, which may

In what caſes average contributions become payable.

(*a*) 1 T. R. 323, ſup. 450.—(*b*) Average is derived from the latin word *averagium*, which comes from the verb *averare* to carry, and originally ſignified a ſervice which the tenant owed to his lord, by horſe or carriage. It is ſaid to have been introduced into commerce to ſhew the proportion and allotment to be paid by every man according to his goods *carried*. *Cowel.*

may be lawfully done; (*a*) or where the maſts, cables, anchors, or other furniture of the ſhip are cut away or deſtroyed, for the preſervation of the whole; (*b*) or money or goods are given as a compoſition to pirates to ſave the reſt; or damage is ſuſtained in defending the ſhip againſt an enemy or pirate; or a ranſom, (when that is legal,) is agreed to be paid to an enemy or pirate for liberating the ſhip; or an expenſe is incurred for phyſic and attendance in curing the officers or ſeamen wounded in defence of the ſhip; or in reclaiming the ſhip, or defending a ſuit in a foreign court of admiralty, and obtaining her diſcharge from an unjuſt capture or detention. In theſe, and the like caſes, where any loſs is ſuſtained, or any expenſe fairly and *bonâ fide* incurred, to prevent a total loſs, ſuch loſs is the proper ſubject of a general contribution, and ought to be rateably borne by the owners of the ſhip, freight, and cargo on board, ſo that the loſs may fall equally on all. This juſt and equitable contribution is called general or groſs average, the regulations of which are found in almoſt every ſyſtem of marine law. (*c*) *Omnium contributione farciatur, quod pro omnibus datum eſt.—Æquiſſimum enim eſt, commune detrimentum fieri eorum qui propter amiſſas res aliorum, conſecuti ſunt ut merces ſuas ſalvas habuerunt.* (*d*)

This is the original and proper meaning of average. When underſtood in this ſenſe, it is called *general*, or *groſs* average, becauſe it falls generally upon the whole or groſs

General average.

(*a*) 12 Co. 63, *Mouſe*'s caſe.—(*b*) Si arbor vel aliud navis inſtrumentum, removendi communis periculi cauſa dejectum eſt, contributio debetur. ff. Leg. Rhod. L. 3. de jact. Vid. *Molloy*, b. 2, c. 2, § 6. But if the loſs of the maſts, anchors, ſails, &c. be occaſioned by mere ſtreſs of weather, this is not a general average, but the loſs falls on the owner. *Le Guidon*, ch. 5, art. 20.—(*c*) Vid. Mo. 297. *Show.* Ca. parl. 19. *Beawes* lex merc. 148, 1 *Mag.* 64, 2 *Mag.* 96, 183, *Molloy*, b. 2, c. 2, § 6, 12, ff. Leg. *Rhod.* art. 9. Laws of *Wiſb.* art. 20. Laws of *Ol.* art. 8. See alſo the ordinances of the different commercial ſtates, as collected by *Magens.*—(*d*) ff. Leg. *Rhod.* L. 1. de jact.

groſs amount of the ſhip, freight, and cargo, and alſo to diſtinguiſh it from what is often, though improperly termed *particular average*, but which, in truth, means a particular, and not a general loſs, and has no affinity to average properly ſo called.

Particular average.

Beſides theſe, there are other ſmall charges called *petty* or *accuſtomed* averages. Such as pilotage, towage, light-money, beaconage, anchorage, bridge-toll, quarantine, river-charges, ſignals, inſtructions, caſtle-money, pier-money, digging the ſhip out of the ice, &c. When theſe petty charges are incurred in the uſual courſe of the voyage, they are not conſidered as a *loſs* within the meaning of the policy, but only *a neceſſary and ordinary expenſe*: But if incurred for any extraordinary purpoſe in the voyage, as to provide againſt any impending danger, or in conſequence of the ſhip's being driven out of her courſe by ſtreſs of weather; they will then be deemed groſs or general average, for which the inſurer will be liable. (*a*)

Petty average.

Such petty averages as are the uſual charges of the voyage are not a charge on the inſurers. Otherwiſe if they have been occaſioned by ſtreſs of weather, &c.

A contribution upon a general average can only be claimed in caſes where, upon as much deliberation and conſultation between the captain and officers as the occaſion will admit of, it appears that the ſacrifice, at the time it was made, was abſolutely and indiſpenſably neceſſary for the preſervation of the ſhip and cargo. Some have even gone farther, and have ſaid, that the ſaving of the ſhip and cargo muſt *appear* to have been in fact owing to ſuch ſacrifice. (*b*) But this, beſides being in moſt caſes incapable of proof, is quite unreaſonable and unjuſt.

Average contributions can only be claimed where the ſacrifice was abſolutely neceſſary.

A loſs which does not evidently conduce to the preſervation of the ſhip and cargo, is not a proper ground for an average contribution: As if a pirate, having made himſelf maſter of a ſhip and cargo, take only the goods of a particular perſon; (*c*) or if ſome particular goods be damaged

And where it appears to have conduced to the preſervation of the ſhip.

(*a*) Vid. 1 *Mag.* 72. 2 *Mag.* 278.—(*b*) *Beawes* 148.—(*c*) *Mal.* lex merc. 109.

damaged in a ſtorm; in ſuch caſes the reſt ſhall not be contributory. (*a*) So, if upon the apprehenſion of an enemy, ſome goods are landed and ſecured on ſhore, and the reſt taken; the owner of the goods taken ſhall not have average of the goods ſaved; for the ſalvage of theſe is not the cauſe of the taking of the reſt; neither was the taking of thoſe the cauſe of the ſalvage of the goods ſaved. (*b*)

And where the ſhip and the reſt of the cargo were in fact ſaved.

So, it muſt appear that the ſhip and the reſt of the cargo were in fact ſaved. For if goods be thrown overboard in a ſtorm, and the ſhip afterwards periſh in the ſame ſtorm, there ſhall be no contribution of the goods ſaved, if any; becauſe the object for which the goods were thrown overboard was not attained. But if the ſhip be preſerved by the *jettiſon*, or throwing goods overboard, and continue her courſe, but is afterwards loſt; the effects ſaved from this laſt misfortune, if any, ſhall contribute to the loſs ſuſtained by the jettiſon; becauſe to that their preſervation was once owing. (*c*)

If goods put into lighters to enable a ſhip to get up a river, be loſt, the reſt ſhall contribute: But if the ſhip be loſt, the goods in the lighters ſhall not contribute.

Upon the ſame principle, if a ſhip, upon her arrival at the mouth of a river or harbour, be found too deeply laden to get over a bar, or to ſail up, and the captain, to lighten her, put part of the cargo into lighters, and theſe lighters are loſt; the owners of the ſhip and the remaining goods ſhall contribute to this loſs; becauſe the removal of part of the cargo from the ſhip into the lighters was for the general benefit. But ſhould the ſhip be loſt, and the lighters be ſaved; the owners of the goods preſerved in the lighters ſhall not contribute to this loſs, becauſe the ſhip could not be ſaid to have been loſt for the preſervation of the goods in the lighters, and becauſe it is a general rule that a contribution is only due when the ſhip and the remaining cargo come ſafe to port. (*d*)

If

(*a*) R. *Mo.* 297.—(*b*) R. *Show.* Ca. Parl. 20.—(*c*) 2 *Mag.* 98, 240. Ord. *Louis* XIV. tit. contrib. art. 15, 16. Semb. cont. 1 *Mag.* 56. Vid. *Show.* Ca. Parl. 20. *Mo.* 297.—(*d*) Vid. 1 *Mag.* 56. *Malyne* 109, 110.

Whether the wages and expenſes of the crew during the detention of a ſhip unjuſtly captured be a general average.

If a ſhip be unjuſtly captured and carried into a foreign port, it is ſaid that, not only the charge of reclaiming her, but alſo the wages and expenſes of the ſhip's company during the detention, ſhall be brought into a general average. (*a*)

Whether ſuch charges, where a ſhip is forced to go into port to refit after a ſtorm, be a general average.

It is alſo ſaid, that where a ſhip is forced to enter a port to repair the damage ſhe has ſuffered in a ſtorm, being unable to continue her voyage without apparent riſk of being loſt; that, in ſuch caſe, the wages and proviſions for the crew, from the day it was reſolved to ſeek a port to refit the veſſel, to the day of her departure from thence, with all the charges of unloading, reloading, anchorage, pilotage, and every other expenſe incurred by this neceſſity, ſhall be brought into a general average. (*b*)

Though this point has never yet been expreſsly decided in any *Engliſh* court of juſtice, yet the principle ſeems to have been acceded to at different times by judges of great authority.

Upon a policy on the ſhip, wages while the ſhip was under a repair, not occaſioned by any extraordinary accident, cannot be recovered.

Thus, where an action was brought upon a policy on a ſhip, to recover the amount of wages and proviſions expended during the time ſhe went from *Bengal* to *Bombay* to repair;—Lord *Mansfield*, as he frequently did afterwards on ſimilar occaſions, decided that, as the inſurance was on the *ſhip* only, and the claim was for *wages*, the action could not be maintained. But he ſaid, that there might be caſes where exceptions to the general rule ought to be allowed; but that, in order to conſider a caſe as *excepted*, it muſt appear that the expenſe was abſolutely neceſſary, and occaſioned by ſome of the perils mentioned in the policy.

Lateward v. *Curling*, at N.P. after Trin. 1776. *Park* 125. But there may be exceptions to this rule.

If a ſhip be obliged to put into port to repair, the charges of unloading and re-loading the cargo and the expenſes of the repair are a general average.

In the caſe of *Da Coſta* v. *Newnham*, (*c*) Mr. Juſtice *Buller* cites the above paſſage from *Beawes*, and though it was not neceſſary, he ſaid, to determine that point then, he ſeemed diſpoſed to concur in it. It was, however, determined in that caſe, that where a ſhip is obliged to

(*a*) *Beawes* 150, 1 *Mag.* 67. Vid. Ord. of *Louis* XIV. tit. *avaries*, art. 7.—(*b*) *Beawes* 150.—(*c*) 2 T. R. 407, poſt.

to put into port to repair, and this is neceſſary for the ſafety of the whole concern, the charges of unloading, re-loading, and taking care of the cargo, and alſo the wages and proviſions of the workmen hired for the repair, become a general average. This deciſion comes very near, in principle, to the doctrine in *Beawes:* The only difference conſiſts in this, that *Beawes* allows the wages and proviſions of the ſeamen, during the interruption, to be brought into a general average: But in *Da Coſta* v. *Newnham*, the crew were diſcharged at the place where the ſhip was repaired; and therefore it was not neceſſary to decide that point.

Every injury occaſioned by mere ſea-damage is only a particular average.

No injury occaſioned by mere ſea-damage can be the proper ſubject of general average. As if the ſhip be damaged in her hull or in her rigging, the goods on board ſhall not contribute for this. For the ſhip is like any inſtrument uſed by a workman in his trade. If, in doing his work, he breaks his hammer or his anvil, he can claim no ſatisfaction for this from his employer. '*Si conſervatis mercibus, deterior facta ſit navis, aut quid exarmaverit, nulla facienda eſt collatio: Quia diſſimilis earum rerum cauſa ſit, quæ navis gratia parentur, et earum pro quibus mercedem aliquis acceperit. Nam et ſi faber incudem aut maleum frejerit; non imputaretur ei qui locaverit opus. Sed ſi voluntate vectorum, vel propter aliquem metum, id detrimentum factum ſit; hoc ipſum ſarciri oportet.*' (*a*)

Upon the ſame principle if a ſhip ſpring a leak in a ſtorm, by which goods on board are ſpoiled; this is a ſimple or particular average, or particular loſs, and not the ſubject of an average contribution. (*b*)

The owners of the ſhip may maintain an action againſt the owner of corn on board to recover a contribution for ſacrifices of the ſhip's tackle, & expenſes incurred to ſave the corn.

But in a late caſe, where the captain cut the ſhip's cable and made other ſacrifices of the ſhip's tackle and furniture, to prevent her from being caſt away in a ſtorm; and alſo employed and paid a number of men to keep the ſhip, which had been damaged in the ſtorm, free from water, in order that a cargo of corn which was then on board might not

(*a*) Dig. l. 14, tit. 2, de leg. *Rhod.* de jact. § 1.—(*b*) *Conſolato del mare*, ch. 63, vid. alſo ch. 193, 194. *Le Guidon*, ch. 5, art. 20. Laws of *Wiſbuy*, art. 12. *Roccus* de navib. n. 59.

Birkley and others v. *Preſgrave*, 1 *Eaſt.* 220.

not be damaged; it was determined that this was a general average, and that the owner of the ſhip might maintain an action at law againſt the owner of the corn, to recover his contribution.

What things ſhall be liable to contribute to a general average.

As to the things on board which ſhall be liable to contribute to a general average, the rule ſeems to be,—that the ſhip, freight, and every thing remaining on board that can properly be deemed a part of the cargo, ſhall be ſubject to this charge; and therefore money, plate, and even jewels, though their *weight* could not have increaſed the danger of the ſhip, muſt contribute according to their value; becauſe the ſacrifice was as neceſſary for their preſervation, as for that of any thing elſe on board. (*a*) But the perſons on board, their wearing apparel, the jewels or ornaments belonging to their perſons, ſhall not contribute. (*b*) Neither are ſeamen's wages liable to contribute. (*c*) If it were otherwiſe, ſeamen might ſometimes be tempted to reſiſt when a ſacrifice is neceſſary for the general ſafety.

What not.

It is the captain's duty, on his arrival in port, to ſettle the contribution.

If the ſhip eſcape the dangers which made the ſacrifice neceſſary, and arrive at her port of deſtination, the captain regularly ſhould make his proteſts; and he, with ſome of the crew, (*d*) muſt ſwear that the goods were thrown overboard, money paid, or other loſs ſuſtained, for the ſafety of the ſhip and goods, and for the preſervation of the lives of thoſe on board, and for no other cauſe. (*e*) The average, if not ſettled before, ſhould then be adjuſted, and it ſhould be paid before the cargo is landed; for the owners of the ſhip have a *lien* on the goods on board; not only for the freight, but alſo *to anſwer all averages and contributions* that may be due. (*f*)

Remedy againſt the captain for neglecting to adjuſt the average, or to collect it.

Should this be neglected, the particular ſufferer is not without remedy. As it is the duty of the captain to

(*a*) 1 *Mag.* 62, *Molloy*, tit. Aver. § 4. Per *Buller*, J. in *Peters* v. *Milligan*, at N. P. after M. 1787.—(*b*) Vid. *Molloy*, l. 2, c. 6, § 4, Leg. *Rhod.* § 2, art. 8. Leg. *Oler.* art. 8. Leg. *Wiſb.* art. 20. As to freight, vid. 2 T. R. 407.—(*c*) 1 *Mag.* 71.—(*d*) Mal. lex merc. 113. ſays, *with moſt part of his company.*—(*e*) *Beawes* 148. *Molloy*, l. 2, c. 6, § 2. *Mal.* L. M. 113.—(*f*) *Mal.* L. M. 113.

to detain the goods on board till the contribution be made, an action would, I conceive, lie againſt him, or againſt the owners, for a neglect of that duty. If the loſs was in money paid, an action on the caſe for money paid, would unqueſtionably lie againſt each perſon bound to contribute for his ſhare: If in goods, a ſpecial action on the caſe founded on the cuſtom of trade would lie againſt each perſon liable to contribute, (*a*) or a bill in equity might be filed againſt them all.

How the amount of each perſon's ſhare of the contribution ſhall be ſettled.

The mode of aſcertaining the amount of each perſon's contribution, is not very accurately defined in our law.—It is uſually done, upon the ſhip's arrival at her port of diſcharge, by aſcertaining the neat value of the ſhip, freight, and cargo, as if nothing had been loſt, but all had arrived ſafe. (*b*) Theſe are to be valued at the price they would fetch in ready money at the port of diſcharge; and the neat amount, after deducting all charges, is the ſum which is ſubject to the contribution. (*c*) And each perſon's ſhare of the loſs will bear the ſame proportion to the value of his property, as the whole loſs bears to the aggregate value of the ſhip, freight, and cargo.

In what degree the ſhip ſhall be liable.

In *England* the ſhip contributes for her full value and freight.

Different foreign ſtates have eſtabliſhed a variety of poſitive regulations, as to the *degree* in which the ſhip ſhall be liable to contribute. Some, as in *England*, make the ſhip contribute for her full value and the freight; (*d*) others, for half her value, and one third of the freight; others again, for half the value of ſhip and freight.

And ſhe ſhall be valued at the price ſhe was worth on her arrival at her port of delivery. And the freight is valued at the ſum the ſhip has earned on her arrival there.

In *England*, the ſhip is valued at the price ſhe was worth on her arrival at her port of delivery; and almoſt all foreign ſtates follow the ſame rule. (*e*) The value of the freight is the clear ſum which the ſhip has earned after ſeamen's wages, pilotage, and all ſuch other petty charges as come under the denomination of *petty averages*, are

(*a*) *Mo.* 297, *Show.* Ca. Parl. 19, R. *Birkley* v. *Preſgrave*, 1 *Eaſt.* 220, ſup. 465.—(*b*) It is neceſſary to take the goods loſt into this account, otherwiſe the owner of them would be the only perſon who would not be a loſer.—(*c*) Vid. 1 *Mag.* 69, *Molloy*, tit. Aver. § 15.—(*d*) *Konigſberg*, *Hamburgh*, and *Copenhagen*. Vid. 2 *Mag.* 207, 237, 339.—(*e*) 2 *Mag.* ut ſup.

are deducted; of which the cargo bears two thirds, and the ſhip the remaining third.

How the jettiſon ſhall be valued.

As to the mode of valuing the jettiſon, the rule of the *Roman* law is, '*Portio autem pro æſtimatione rerum quæ ſalvæ 'ſunt, et earum quæ amiſſæ ſunt, præſtari ſolet. Nec ad rem 'pertinet, ſi hæ, quæ amiſſæ ſunt, pluris venire poterunt; quoni- 'am detrimenti, non lucri, ſit præſtatio. Sed in his rebus, qua- 'rum nomine conferendum eſt, æſtimatio debeat haberi, non quan- 'ti emptæ ſint, ſed quanti venire poſſunt.* (*a*) In *England* it was formerly the cuſtom to value goods at *prime coſt*, if the loſs happened before half the voyage was performed; but if after, then at the price they would have borne at the port of delivery. (*b*) But that diſtinction is exploded, and it is now the ſettled practice with us, to eſtimate the goods loſt at the price they would have fetched at the port of delivery, on the ſhip's arrival there, freight, duties, and other charges being deducted. (*c*)

Under the general words of the policy, the inſurer is bound to pay all average contributions.

Theſe contributions, under the general words of the policy, are a charge which the inſurer is bound to pay; and it makes no difference whether the inſured pay towards, or receive, them: He ought, in either caſe, to bear his proportion of the general loſs, and that muſt fall on the inſurer. The doctrine of *Roccus* is, '*Jactu facto, 'ob maris tempeſtatem, pro ſublevanda navi, an teneantur aſſecu- 'ratores ad ſolvendum æſtimationem rerum jactarum domino ipſa- 'rum? Dic eos non teneri, quia pro rebus jactis ſit contributio, 'inter omnes merces habentes in illa navi pro ſolvendo pretio dom- 'ino ipſarum, et ideo ſi aſſecuratus recuperat pretium rerum jac- 'tarum, non poteſt agere contra aſſecuratores; tamen tenentur 'aſſecuratores ad reficiendum illam ratam et portionem, quam 'ſolvit aſſecuratus in illam contributionem faciendo inter omnes, 'habentes merces in illa navi, quæ portio cum non recuperetur ab 'aliis, habetur pro deperdita, et proinde ad illam portionem tenen- 'tur aſſecuratores.*' (*d*)

Sect.

(*a*) *Dig.* lib. 14, tit. 2, De lege Rhod. de jactu, § 4.—(*b*) *Mal.* Lex Merc. 113.—(*c*) *Molloy*, tit. Aver. § 15. Vid. 2 *Mag.* 100, 285, 339.—(*d*) *Roccus*, h. t. n. 62.

Sect. 8.

Of Loſs by the Expenſe of Salvage.

AS the expenſe of ſalvage, like average contributions, is a charge for which the inſurer is liable, within the meaning of moſt policies, (*a*) the ſubject of ſalvage muſt, like that of average, ſometimes incidentally occur in the conſideration of partial loſſes; and therefore it will be proper, under this head, to inquire in what caſes, and to what amount, ſalvage ſhall be a charge upon the inſurer.

Salvage what.

Salvage originally meant the thing or goods ſaved from ſhipwreck or other loſs; and in that ſenſe it is generally to be underſtood in our old books. But it is at preſent more generally underſtood to mean the allowance made to thoſe by whoſe means the ſhip or goods have been ſaved from the effects of ſhipwreck, fire, pirates, enemies, or any other loſs or misfortune. At common law, the party who has ſaved the goods of another from loſs or any imminent peril, has a *lien* on the goods, and may retain them in his poſſeſſion till payment of a reaſonable ſalvage, like that which a taylor, an inn-keeper, or a common carrier, has upon the clothes, the horſes, or the goods of his cuſtomer. (*b*)

At common law the party has a *lien* on the thing ſaved, till payment of ſalvage.

How the expenſe of ſalvage is regulated in *England*.

Every maritime ſtate has certain regulations to aſcertain in what caſes, and to what amount, ſalvage ſhall be paid. To attempt to give an account of all ſuch regulations, in foreign countries, would be more a work of curioſity than of utility.—It will be ſufficient for our preſent purpoſe, to ſtate ſhortly the regulations which the

(*a*) The policy, in caſe of loſs or misfortune, authorizes the inſured to ſue and labour for the recovery of the thing inſured, to the charges whereof the inſurers engage to contribute.—(*b*) Per *Holt*, C. J. in *Hartfort* v. *Jones*, 1 Lord *Ray*. 393; 2 *Salk*. 654; Vid. *Emerig*. tom 2, p. 202. *Pothier*, h. t. n. 134.

the law of *England* has eſtabliſhed on this ſubject, and which will be principally found in our ſtatutes; ſome of which are of very ancient date. (*a*) But the regulations which are now principally in force, are found in the ſtat. 12 An. ſtat. 2, c. 18. and ſubſequent acts, made for the protection of ſhips and goods ſtranded on the coaſts of this kingdom.

That ſtatute, after directing the means to be employed for the preſervation of ſhips in diſtreſs, enacts, (§ 2.) 'That, all perſons who ſhall be employed in preſerving 'ſhips or veſſels in diſtreſs, or their cargoes, ſhall, with-'in 30 days after the ſervice performed, be paid a *rea-'ſonable reward* for the ſame, by the commander or 'other ſuperior officer, mariners, or owners of the *ſhip* 'or goods ſo ſaved; and in default thereof, the ſhip, 'veſſel, or goods ſo ſaved ſhall remain in cuſtody of the 'collector of the cuſtoms or his deputy, until all charges 'ſhall be paid, and until all perſons ſo employed ſhall 'be reaſonably gratified for their trouble; or good ſecu-'rity given, to the ſatisfaction of the ſeveral parties that 'are to receive the ſame. And in caſe the commander 'or other ſuperior officer, mariners, or owners, of the 'ſhip or goods ſo ſaved, ſhall diſagree with the ſaid 'officer of the cuſtoms, touching the money deſerved 'by the perſons ſo employed, the commander of the 'ſhip ſaved, or the owner of the goods therein, and the 'ſaid officer of the cuſtoms may nominate three neigh-'bouring juſtices, who ſhall adjuſt the *quantum* of the 'gratuity to be paid to the ſeveral perſons acting in the 'ſalvage of the ſhip or goods; and ſuch adjuſtment 'ſhall be binding to all parties, and ſhall be recoverable 'in an action at law to be brought by the reſpective 'perſons to whom the ſame ſhall be allotted by the juſ-'tices. And in caſe no perſon ſhall appear to make his 'claim to all or any of the goods ſaved, then the chief 'officer of the cuſtoms of the neareſt port, ſhall apply 'to three of the neareſt juſtices, who ſhall put him or ſome

By 12 An. ſtat. 2. c. 18, § 2. Perſons employed in the ſalvage of ſhips, &c. ſhall within 30 days be paid a reaſonable reward.

How this ſhall be ſecured to them.

If the parties diſagree about the *quantum*, 3 neighbouring juſtices ſhall adjuſt it.

How the goods ſaved ſhall be diſpoſed of, if no owner appear.

(*a*) 3 *Ed.* I. c. 4; 4 *Ed.* I. c. 2; 27 *Ed.* III. c. 13.

'ſome reſponſible perſon in poſſeſſion of ſuch goods, ſuch 'juſtices taking an account thereof in writing, to be ſign-'ed by ſuch officers of the cuſtoms; and if the goods ſhall 'not be legally claimed within 12 months, by the right 'owners, they ſhall be publickly ſold, or if periſhable, 'forthwith ſold, and the produce of the ſale, after all 'charges deducted, with a fair account of the whole, ſhall 'be tranſmitted to the *Exchequer*, there to remain for the 'benefit of the owner, when appearing; who, upon affi-'davit, or other proof of his right, to the ſatisfaction of 'one of the barons of the coif, ſhall, upon his order, re-'ceive the ſame out of the *Exchequer*.'

This ſtatute alſo preſcribes the puniſhment to be inflict-ed on perſons guilty of plundering or deſtroying ſhips in diſtreſs. But this being found inſufficient to repreſs theſe barbarous practices, the ſtat. 26 *G.* II. c. 19, has enacted a variety of further regulations for the more effectual puni-ſhment of offenders, and the better protection of ſhips in diſtreſs.

On the ſubject of ſalvage, the 5th ſection of this act provides, that, 'In caſe any perſon, not employed in the 'ſalvage of the ſhip or goods, ſhall, in the abſence of 'the perſons ſo employed and authorized, ſave any ſuch 'ſhip or goods, and cauſe the ſame to be carried, for the 'benefit of the owners, into port, or to any near adjoin-'ing cuſtom-houſe, or other place of ſafe cuſtody, imme-'diately giving notice thereof to ſome magiſtrate or cuſ-'tom-houſe, or exciſe-officer; or ſhall diſcover to ſuch 'magiſtrate or officer where ſuch goods are wrongfully 'bought, ſold, or concealed, then ſuch perſon ſhall be en-'titled to a reaſonable reward for ſuch ſervices; to be paid 'by the maſter or owners of ſuch veſſels or goods; and to 'be adjuſted in caſe of diſagreement about the *quantum*, 'in like manner as the ſalvage is to be adjuſted and paid 'by virtue of the ſtat. 12 An.'

By 26 *G.* II c. 19, § 5 Perſons, though not *employed* in the ſalvage, who ſhall ſave any ſhip or goods, or give notice of any goods unlawfully bought, ſold, or concealed, ſhall be entitled to ſalvage.

And by § 6, 'For the better aſcertaining the ſalvage 'to be paid in purſuance of this and the former act, 'the

By § 6. The neareſt magiſtrate, collector of the cuſtoms,

or chief conſtable ſhall call a meeting of the ſheriff, magiſtrates, &c. five of whom may employ perſons for ſaving ſhips, &c.

'the juſtice, mayor, bailiff, collector of the cuſtoms, or 'chief conſtable, who ſhall be neareſt to the place where 'the ſhip or goods ſhall be ſtranded, ſhall forthwith give 'public notice for a meeting, to be held as ſoon as poſ-'ſible, of the ſheriff, or his deputy, the juſtices, mayors, 'or other chief magiſtrates of towns, coroners, or com-'miſſioners of the land tax, or any five or more of them, 'who are required to give aid in the execution of this and 'the former act, and to employ proper perſons for the ſaving 'of ſhips in diſtreſs, and ſuch ſhips and effects as ſhall be

And examine perſons on oath, &c. to adjuſt the *quantum* of ſalvage.

'ſtranded or caſt away; and alſo to examine perſons on 'oath touching the ſame, or the ſalvage thereof, and to 'adjuſt the *quantum* of ſuch ſalvage, and diſtribute the 'ſame among the perſons concerned in ſuch ſalvage, in 'caſe of diſagreement among the parties, or the ſaid per-'ſons; and that every ſuch magiſtrate, &c. attending and

Such magiſtrate, &c. to have 4s. a day.

'acting at ſuch meeting, ſhall be paid four ſhillings a day 'for his expenſes, out of the goods ſaved by their care or

By § 7, if the ſalvage be not paid or ſecurity given within 40 days, the officer of the cuſtoms ſhall raiſe money by bill of ſale of the ſhip or goods ſaved, redeemable on payment of principal and 4 *per cent.* intereſt.

'direction.—Provided (§ 7.) that if the charges and re-'wards for ſalvage, directed to be paid by this and the 'former act, ſhall not be fully paid, or ſufficient ſecurity 'given for the ſame within 40 days after the ſervices per-'formed, the officer of the cuſtoms concerned in ſuch 'ſalvage ſhall borrow or raiſe ſo much money as ſhall be 'ſufficient to pay ſuch charges, or any part thereof re-'maining unpaid, or not ſecured as aforeſaid, by or upon 'one or more bill or bills of ſale under his hand and ſeal, 'of the ſhip or veſſel, or cargo ſaved, or ſuch part thereof 'as ſhall be ſufficient, redeemable on payment of the prin-'cipal ſum borrowed, and intereſt at 4 *per cent. per annum.*'

There are many other regulations in this act, as to the perſons by whom this and the former act ſhall be put in force, and as to the detection and puniſhment of offenders. The foregoing extracts which have been made for the purpoſe of ſhewing that, by our law, the ſalvage of ſhips or goods ſtranded or caſt away is a reaſonable ſatisfaction to the perſons employed in ſaving and protecting them for their labour; to be eſtimated, not according

cording to their own arbitrary will, but by perſons of the firſt reſpectability in and near the place where the misfortune happens.

How ſalvage upon a *recapture* was regulated by the marine law.

With reſpect to ſalvage in the caſe of recapture by the marine law of *England*, as practiſed in our courts of admiralty previous to any parliamentary regulations, if the ſhip or goods were retaken before condemnation, till which time the *jus poſtliminii* continued, the original owner was entitled to have reſtitution decreed to him, on payment of a *reaſonable ſalvage* to the recaptors. But by ſeveral ſtatutes, (*a*) ſalvage upon a recapture was fixed at certain rates, according to the length of time the recaptured ſhip was in the hands of the enemy. It will be ſufficient, however, for our preſent purpoſe, to ſtate the regulations now in force as they were eſtabliſhed by the laſt prize act.

By 33 G. III. c. 66, ſhips, &c. *at any time* recaptured, ſhall pay, if retaken by men of war, one *eighth*, if by privateers, one *ſixth*, for ſalvage.

By ſtat. 33 *G.* III. c. 66, § 42. 'If any ſhip or veſſel, 'taken as prize, or any goods therein, ſhall appear, in the 'court of admiralty, to have belonged to any of his Ma- 'jeſty's ſubjects, which were before taken by any of his 'Majeſty's enemies, and at any time afterwards retaken 'by any of his Majeſty's ſhips, or any privateer, or other 'ſhip or veſſel under his Majeſty's protection; ſuch ſhips, 'veſſels, and goods ſhall, in all caſes, (ſave as hereafter 'excepted,) be adjudged to be reſtored, and ſhall be ac- 'cordingly reſtored, to ſuch former owner or owners, he 'or they paying for ſalvage, if retaken by any of *his* '*Majeſty's ſhips, one eighth* part of the true value thereof, 'to the flag officers, captains, &c. to be divided as the 'ſame act directs: And if retaken by any *privateer*, or 'other ſhip or veſſel, *one ſixth* part of the true value of 'ſuch ſhips and goods, to be paid to the owners, officers 'and ſeamen of ſuch privateer or other veſſel, without 'any deduction. And if retaken by the joint operation 'of one or more of his Majeſty's ſhips, and one or more 'private ſhips of war, the judge of the court of admi- 'ralty,

If retaken by both jointly, the judge of the admiralty ſhall order ſuch ſalvage, and in ſuch proportions, as he ſhall deem fit.

(*a*) Vid. 13 *G.* II. c. 4, and 29 *G.* II. c. 34.

'ralty, or other court having cognizance thereof, ſhall 'order ſuch ſalvage, and in ſuch proportions, to be paid 'to the recaptors, by the owners, as he ſhall, under the 'circumſtances of the caſe, deem fit and reaſonable. (*a*)

But if the recaptured ſhip be ſet-forth by the enemy as *a ſhip of war*, ſhe ſhall be lawful prize to the recaptors.

'But if ſuch recaptured ſhip or veſſel ſhall appear to 'have been ſet forth, by the enemy, as a ſhip or veſſel 'of war, the ſaid ſhip or veſſel ſhall not be reſtored to 'the former owners; but ſhall, in all caſes, whether 'retaken by any of his Majeſty's ſhips, or by any pri-'vateer, be adjudged lawful prize for the benefit of the 'captors.'

The inſured need not *declare* for ſalvage, but may recover under a declaration for the loſs which occaſioned it, and for the damage the goods ſaved have ſuſtained.

As the inſurer does not, in expreſs words, undertake to pay ſalvage, perhaps the inſured could not declare for a loſs *by the payment of ſalvage*. That form of declaring might, perhaps, be thought too general. Indeed it would be uſeleſs to declare ſo, for he may declare as for that ſpecies of loſs which occaſioned the payment of ſalvage, and recover the ſalvage actually paid. (*b*) And upon the ſame declaration he may recover for the loſs, if any, ſuſtained by damage done to the goods ſaved.

The court of admiralty regulates the rate of ſalvage in the caſe of recaptured neutrals.

Theſe regulations relate only to the ſalvage of *Britiſh* ſhips recaptured. In the caſe of neutral ſhips captured by the enemy, and retaken by *Britiſh* men of war or privateers, the court of admiralty have a diſcretionary power of allowing ſuch ſalvage, and in ſuch proportions, as, under the circumſtances of each particular caſe, may appear juſt. But there is no poſitive law, or binding regulation, to which parties may appeal to regulate the rate of ſuch ſalvage. *Some* ſalvage in ſuch caſes is generally allowed; and in practice the rate is uſually regulated by the ſame rules as in the caſe of *Britiſh* property.

Before

(*a*) It ſeems a little ſingular that, in the caſe of a joint capture by men of war and privateers, the judge of the court of admiralty has power to order, not only the proportion of the ſalvage which each ſhall receive, but alſo to aſcertain the *amount* of the ſalvage which the owners ſhall pay to the recaptors.—(*b*) R. *Cary* v. *King*, Ca. Temp. *Hard.* 304. Vid. inf. ch. 17, § 2.

Before an action will lie for a loſs by payment of ſalvage, the amount of ſuch ſalvage muſt have been aſcertained by the deciſion of the court of admiralty, which alone has juriſdiction to determine as to the *right* to ſalvage in all caſes, and, in the caſe of the recapture of neutrals, as to the *amount* of ſuch ſalvage.

Salvage muſt be paid under an adjudication of the court of admiralty, to entitle the inſured to claim it from the underwriters.

When the ſalvage, however, is very high, the inſured may abandon, and call upon the inſurer as for a total loſs, as we ſhall have occaſion more particularly to obſerve hereafter, in the chapter upon abandonment.

Sect. 9.

Of Wilful and Fraudulent Loſſes.

AT the concluſion of the ſixth ſection of the preſent chapter (*a*) we ſhortly adverted to the puniſhment of barratry by the laws of other countries. We will in the preſent ſection ſhew how piracy and other offences of this nature, and alſo the offence of procuring wilful and fraudulent loſſes, with intent to defraud inſurers, are puniſhable by the law of *England*.

How piracy is puniſhed by the law of *England*.

The crime of piracy, or robbery upon the high ſeas, is an offence againſt the univerſal law of ſociety; a pirate being, as Lord *Coke* deſcribes him, *hoſtis humani generis*. By the ancient common law, piracy, if committed by a *ſubject*, was held to be a ſpecies of treaſon, being contrary to his natural allegiance; and by an *alien*, to felony only: But now, ſince the ſtatute of treaſons, 25 *Ed.* III. c. 2, it is holden to be only felony in a ſubject. (*b*) Formerly this offence was only cognizable by the admiralty courts, which proceed by the rules of the civil law. (*c*) But it being inconſiſtent with the liberties of the nation, that any man's life ſhould be taken away, unleſs

(*a*) Sup. 459.—(*b*) 3 Inſt. 113.—(*c*) 1 *Hawk.* P. C. 98.

unleſs by the judgment of his peers, the ſtat. 28 *H.* VIII. c. 15, eſtabliſhed a new juriſdiction for this purpoſe, which proceeds according to the courſe of the common law. (*a*)

The offence of piracy, by the common law, conſiſts in the committing of thoſe acts of robbery and depredation upon the high ſeas, which, if committed upon land, would amount to felony there. (*b*) But by ſtat. 11 and 12 *W.* III. c. 7, § 8 and 9. 'If any natural 'born ſubject commit any act of hoſtility upon the high 'ſeas, againſt others of his Majeſty's ſubjects, under 'colour of a commiſſion from any foreign power; 'or if any commander or mariner ſhall betray his truſt, 'and run away with any ſhip, boat, ordnance, ammu- 'nition or goods; or yield them up voluntarily to any 'pirate; or bring any ſeducing meſſage from any pi- 'rate, enemy, or rebel; or conſult, combine, or con- 'federate with, or attempt to corrupt, any officer or 'mariners to yield up, or run away with, any ſhip or 'goods, or turn pirate; or ſhall lay violent hands on 'his commander, to hinder him from fighting in de- 'fence of his ſhip; or ſhall confine him, or make, or 'endeavour to make, any revolt in the ſhip, ſhall be 'adjudged to be a pirate, felon, and robber, and ſhall 'ſuffer death and loſs of lands, as a pirate, felon and 'robber on the ſea ought to ſuffer, whether he be 'principal, or merely acceſſary by ſetting forth ſuch 'pirates, or abetting them before the fact, or receiving 'or concealing them or their goods, after it:' And the ſtat. 4 *G.* I. c. 11, expreſsly excludes the principals from the benefit of clergy. By the ſtat. 8 *G.* I. c. 24, trading with known pirates, or furniſhing them with ſtores or ammunition, or fitting out any veſſel for that purpoſe; or confederating or correſponding with them, or forcibly boarding any merchant veſſel, though without ſeizing or carrying her off, and deſtroying or throwing any

(*a*) Vid. 4 *Bl.* Com. 71.—(*b*) 1 *Hawk.* P. C. 100.

any of the goods overboard, ſhall be deemed piracy; and ſuch acceſſaries to piracy as are deſcribed in the above ſtat. 11 and 12 *W.* III. are declared to be principal pirates, and all pirates convicted by virtue of this act, are made felons without benefit of clergy. Thus does the ſtatute law of *England* aid and enforce the law of nations, as a part of the common law, by inflicting an adequate puniſhment upon offences againſt that univerſal law.

The ſtat. 1 *An.* ſt. 2, c. 9, § 4 and 5, makes it a ſimple felony in any maſter or mariner, wilfully to caſt away, burn, or deſtroy any ſhip to which he belongs, to the prejudice of the *owner*, or of any *merchant who ſhall load goods thereon*; and takes away the benefit of clergy from ſuch offences, *committed on the high ſeas*.

The 1 *An.* ſt. 2. c. 9, makes it felony to deſtroy any ſhip, to the prejudice of the owners of the ſhip or goods on board; and takes away clergy, if committed at ſea.

Though the inſurers are only anſwerable for loſſes ariſing from the *accidents and misfortunes* incident to maritime adventures, and not for ſuch as proceed from contrivance or deſign on the part of the inſured; yet the temptation to defraud inſurers by the wilful and concerted deſtruction of ſhips and goods inſured, in order to give a colour to fraudulent claims for pretended loſſes, has been found productive of ſo many evils, that it became neceſſary for the legiſlature to interpoſe its authority to reſtrain them: And therefore, by ſtat. 4 *G.* I. c. 12, § 3, 'If any owner, captain, maſter, mariner, or 'other officer of any ſhip, ſhall wilfully caſt away, burn, 'or otherwiſe deſtroy the ſhip, of which he is owner, 'or to which he belongs; or in any manner direct 'or procure the ſame to be done, to the prejudice of 'the perſon or perſons that ſhall underwrite any poli-'cy of inſurance thereon; or of any merchant that 'ſhall load goods thereon, ſhall ſuffer death.'

The 4 *G.* I. c. 12. extends this to the caſe of the owner or maſter who ſhall deſtroy any ſhip to the prejudice of the owners of, or underwriters upon goods.

This ſtatute having only made this crime a ſimple felony, it was found inſufficient to reſtrain the commiſſion of it, and therefore the ſtat. 11 *G.* I. c. 29, § 6 and 7, takes

The 11 *G.* I. c. 29, takes away clergy from ſuch offenders in all caſes.

7, takes away from it the benefit of clergy, and inflicts the ſame puniſhment on perſons guilty of the like offences, '*with intent to prejudice any owner of ſuch ſhip*:' And it further enacts that if ſuch offences be committed within the body of any county, they ſhall be tried in the ſame manner as other felonies; if on the high ſeas, then according to the directions of the ſtat. 28 *H.* VIII. c. 15.

CHAP.

CHAP. XIV.

Of Abandonment.

Preliminary Obſervations.

IT has already been obſerved, (*a*) that the term *total loſs* does not only ſignify the abſolute deſtruction of the thing inſured, according to its natural import; but alſo that, in legal and commercial language, it means ſuch a loſs or damage to the thing inſured, though it ſpecifically remain, as renders it of little or no value to the owner. It alſo means any loſs or misfortune whereby the voyage is loſt, or become not worth purſuing, and the projected adventure fruſtrated. In ſuch caſes the inſured is entitled to call upon the inſurer as for a total loſs: But then he muſt *abandon*; that is, he muſt renounce and yield up to the inſurer all his right, title, and claim to what may be ſaved, and leave it to him to make the moſt of it for his own benefit. The inſurer then ſtands in the place of the inſured, and becomes legally entitled to all that can be reſcued from deſtruction. (*b*) The idea of abandonment therefore, preſuppoſes a total loſs in this latter ſenſe, and implies that ſomething remains which may be ſaved, and which may be given up, or abandoned, to the inſurers.—For if the inſured could only abandon, in the caſe of a total loſs, in the ſtrict and natural ſenſe of the words, there would be nothing to abandon, and abandonment could then be only an uſeleſs form.

Nature of abandonment.

It has been ſaid that the practice of abandoning dates its origin from the period when the contract of inſurance itſelf firſt came into uſe; (*c*) and yet it does not ſeem to be a right which neceſſarily reſults from the nature of

Whether coeval with inſurance itſelf.

(*a*) Sup. 414.—(*b*) Vid. *Pothier*, h. t. n. 133. Ord. *Louis* XIV. h. t. art. 47. Ord. *Bilboa*, art. 32. 1 *Vez.* 98. —(*c*) *Park* 143.

of the contract.—That the loſs or damage ſhould be made good by the inſurer, who has made himſelf reſponſible, is perfectly reaſonable, and conformable to the ſpirit of the contract. But it does not neceſſarily follow from thence, that, in caſe of a diſaſter, he ſhould be *forced* to become the proprietor of the ſhip or goods inſured, merely becauſe he was a ſurety for their ſafe arrival; indeed the author of *Le Guidon* ſays, that abandonment is only to be reſorted to in extreme caſes. (*a*)

Its probable origin.

It ſeems more probable that abandonment aroſe from the practice of occaſionally introducing into policies particular ſtipulations, that if the thing inſured ſhould be ſpoiled or greatly damaged by any of the perils inſured againſt, it ſhould be abandoned to the inſurers, who ſhould be thereupon obliged to pay the entire ſum inſured; and that ſimply making good the damage ſhould not be ſufficient to diſcharge them; and ſtipulations like this, being frequently introduced into the contract, became at length the foundation of general rules, which have been eſtabliſhed by poſitive law in ſome countries, and adopted in others as part of the general law of inſurance.

Whether it has been carried too far.

Be this as it may, it has been thought that in many inſtances the practice of abandoning has been carried too far; and that the inſured ſhould, in no caſe, be permitted to abandon, where the effects inſured, or the greateſt part of them, ſtill exiſt, and are in the power of the inſured. Mr. Juſtice *Buller* ſeems to have been of opinion, that when this queſtion firſt came before our courts, it would have been the wiſeſt policy to have determined that the owners ſhould in no caſe be allowed to abandon, where the property ſtill exiſted. (*b*) The firſt caſe we find in our books on the right of abandonment, came before Lord *Hardwicke* in the court of Chancery in the year 1744; and he, after ſome deliberation, determined that where a recaptured ſhip and cargo were ſold to pay the ſalvage, the inſured had a right to abandon the ſurplus, and claim as for a total loſs. (*c*)

It

(*a*) *Le Guidon*, c. 7, art. 1.—(*b*) Vid. 1 T. R. 615, 616.—(*c*) Vid. *Pringle* v. *Hartley*, 3 *Atk.* 195, inf. 495.

It muſt be admitted, that the privilege of abandoning in every caſe which is deemed a total loſs may ſometimes be liable to great abuſe. Where, as in the caſe of capture, the thing inſured, and every part of it, is completely gone out of the power of the inſured, it is juſt and proper that he ſhould recover at once as for a total loſs, and leave the *ſpes recuperandi* to the inſurer, who will have the benefit of a recapture, or of any other accident by which the thing may be recovered. But it ſeems, at firſt ſight, impolitic, not to ſay unreaſonable, that the owner of a ſhip which is ſtranded, (the captain and crew being his ſervants, on the ſpot, and in poſſeſſion of the ſhip and cargo,) ſhould be at liberty to abandon theſe to a number of underwriters who ſometimes find it difficult to act in concert, and who have, perhaps, no means of diſpoſing of the property thus thrown upon their hands, but to the greateſt diſadvantage.

On the other hand, it may be truly ſaid that the captain muſt occaſionally be the agent, not only of the owners or freighters of the ſhip, but alſo of every perſon intereſted either in the ſhip or cargo; that he, in caſe of misfortune, is bound to do the beſt in his power for the benefit of all concerned; and that, whether he diſpoſes of what is ſaved for account of the inſured, or the inſurer, comes to the ſame thing, ſince in both caſes the amount muſt go in diminution of a total loſs. Perhaps, too, the notice of abandonment, which may, in ſome caſes, enable the underwriters to ſuperintend the diſpoſal of what may be ſaved, may ſometimes be productive of very beneficial effects, in preventing frauds.

In treating this ſubject we will conſider,

1. In what caſes the inſured may abandon;
2. Within what time this muſt be;
3. The form of the abandonment;
4. The effect of it;
5. Of the ordering and diſpoſal of the effects abandoned.

Sect.

Sect. 1.

In what Caſes the Inſured may abandon.

The general principle upon which the right of abandoning reſts.

IN general it may be laid down that, by the law of inſurance, as underſtood in *England*, the inſured may abandon in every caſe where, by the happening of any of the misfortunes or perils inſured againſt, the voyage is loſt, or not worth purſuing, and the projected adventure is fruſtrated; or where the thing inſured is ſo damaged and ſpoiled as to be of little or no value to the owner; or where the ſalvage is very high; or where what is ſaved is of leſs value than the freight; or where further expenſe is neceſſary, and the inſurer will not undertake, at all events, to pay that expenſe, &c. (*a*)

In what caſes it is permitted in *France*.

The ordinance of the marine of *Louis* XIV. (*b*) which in this, as in moſt other particulars, is collected from the ſame ancient ſources from whence other countries have drawn their principles of the law of inſurance, confines abandonment to theſe five caſes; capture, ſhipwreck, ſtranding, arreſt of princes, or the *entire loſs of the effects inſured.* (*c*)

Valin thinks the latter words mean, not an abſolute deſtruction, but a *general loſs.* (*d*)—*Pothier* ſays they mean a total, or *almoſt* total, loſs. (*e*) This he explains by ſaying, that goods which are conſiderably damaged are deemed to be goods loſt; and therefore when all, or almoſt all the goods are in that ſtate, it is a total loſs. Both theſe authors cite *Le Guidon*, which lays it down that the inſured may abandon when there is an average loſs or damage which exceeds half the value of the goods inſured, or

(*a*) Per Lord *Mansfield*, in *Mills* v. *Fletcher*, inf. 497.—(*b*) h. t. art. 46.—(*c*) "*Perte entiere des effets aſſurés.*"—(*d*) "*Perte generique des effets aſſurés, ſans être abſolue.*" *Valin* ſur. art. 19, li. t. p. 61.—(*e*) "*Perte totale ou preſque totale des effets aſſurés.*" *Pothier*, li. t. n. 119.

or in case they be so damaged as not to be worth the freight or little more. (*a*)

Emerigon objects to both these interpretations, as being vague and uncertain, and as leaving it too much in the breast of the judge to decide what shall be an *entire*, or *almost* entire, loss, which, he says, must lead to great doubts and ruinous litigation.(*b*)

By the *French* law, the right to abandon seems to depend on the *species of misfortune* which has happened; with us it depends rather on the *degree of loss*, sustained in consequence of it.

Such are the general principles upon which the right of abandoning rests: We will now take a view of the cases in which those principles have been exemplified, *first*, upon losses by capture, and arrest of princes; and *secondly*, upon other losses.

1. *Of the right of abandoning, upon capture, and arrest of princes.*

As capture and arrest of princes have afforded the most frequent occasions for abandonment, so most of the great leading principles upon which the right of abandoning rests, have been fully discussed and established in cases of that sort.

Capture by an enemy or a pirate, or an arrest of princes, or even an embargo, is *primâ facie* a total loss; and immediately upon the capture, or upon a mere arrest, or at any time while the ship continues under detention, the insured may elect to abandon, and give notice to the insurer of his intention so to do; and thus entitle himself to claim as for a total loss from the insurer. For, from the moment of the capture, the owners lose their power over the ship and cargo, and are deprived of the free disposal of them; and, in the opinion of the merchant, his

Capture or arrest of princes, is *primâ facie*, a total loss.

(*a*) "*Le marchand chargeur est en liberté de faire à ses assureurs de la propriété qu'il a en la marchandise chargée, lors et quand il advient avarie qui excéde ou endommage la moitié de la marchandise ou telle empirance en la marchandise qu'elle ne value le frêt, ou peu de chose d'avantage.*" *Le Guidon*, ch. 7, art. 1.—(*b*) *Emerig.* tom. 2, p. 183.

his right of diſpoſal being ſuſpended or rendered uncertain, is equivalent to a total deprivation, It would therefore be unreaſonable to oblige the inſured to wait the event of capture, detention, or embargo. (*a*)

Upon a wager policy the inſured cannot abandon.

There is this difference between a policy *upon intereſt*, and a *wager policy*, that in the one caſe the inſured may, if he think proper, abandon the moment he has notice of a capture or detention, and this will bind the underwriters, whatever may be the ultimate fate of the ſhip; but in the caſe of a wager policy there can be no abandonment, becauſe the inſured has nothing to abandon. (*b*)

But a capture or arreſt does not *neceſſarily* terminate in a total loſs.

But a capture or arreſt does not neceſſarily, and at all events, terminate in a total loſs, ſo as to entitle the inſured to abandon; for as he cannot abandon till he has received advice of the loſs; if, at the time he receives ſuch advice, or before he has elected to abandon, he receive advice that the ſhip or goods inſured are recovered, or are in ſafety, he cannot then abandon; becauſe he can only abandon *while* it is a total loſs, and he knows it to be ſo; not after he knows of the recovery. Therefore, if a captured ſhip be retaken and permitted to proceed on her voyage, ſo that ſhe ſuffers but a ſmall temporary inconvenience; this would only be a partial, and not a total loſs. (*c*)

Neither does a recapture neceſſarily deprive the inſured of the right to abandon.

On the other hand, a title to a reſtitution upon a recapture does not neceſſarily, and at all events, deprive the inſured of the right to abandon: For if, in conſequence of the capture, the voyage be loſt, or not worth purſuing; if the ſalvage be very high; if farther expenſe be neceſſary, and the inſurer will not undertake at all events to

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(*a*) Vid. 2 *Bur.* 696, ſup. 429.—(*b*) Vid. Lord *Manſfield*'s judgment in *Kulen Kemp* v. *Vigne*, 1 T. R. 304, ſup. 106.—(*c*) By the law of *France*, the ſhip being once captured, it is always a total loſs; and the legal effect of it is preſumed to continue, though the ſhip be releaſed or retaken. The recovery of the goods inſured is only for the account of the inſurer, who cannot, under pretence that they are arrived at their port of deſtination, refuſe the abandonment. The recovery of the goods is merely in nature of ſalvage. *Emerig.* tom. 2, p. 188.

to pay it, he may abandon.—The rule is, that, if the thing insured be recovered before any loss is paid, the insured is entitled to claim as for a total or a partial loss, according to the final event; that is, according to the state of the case at the time he makes his claim. There is no vested right to a total loss, till the insured, having a right to abandon, elects to do so; for he is only entitled to an indemnity for his loss as it stands at the time of the action brought, or offer to abandon.

If the thing insured be recovered before the loss is paid, the loss will be total or partial, according to the final event.

But if, after a total loss has been actually paid, the thing insured be recovered, the insurer cannot oblige the insured to refund the money he has received; but he shall stand in the place of the insured, and so no injustice is done.

But if, after a total loss has been paid, the thing insured be recovered, the insured shall not be obliged to refund.

The two following cases are cited as examples to shew that though a captured ship be recaptured, yet if the voyage be lost, the loss will be total, and the insured will have a right to abandon.

Though there be a recapture, yet, if the voyage be lost, the insured may abandon.

The first was the case of a ship insured from *London* to *Bermudas* and *Carolina*, taken by a *Spanish* privateer, and carried into *Boston* in *America*, where no person appearing to give security or answer for the moiety to satisfy the salvage, she was condemned and sold in the court of admiralty there. The recaptors had their moiety of the proceeds, and the surplus remained in the hands of the officers of the court.—An action at law was brought upon the policy by the insured, who obtained a verdict against the underwriter for a total loss. The underwriter filed a bill in Chancery, and moved for an injunction to stay the proceedings at law; insisting that the insured ought not to recover more than the moiety of the loss, as the stat. 13 *G.* II. c. 4. § 18, gave the thing saved to the owner, who was entitled to receive it from the officers of the admiralty court at *Boston*. The insured, in his answer, swore that he had *offered*, and was now willing, to *relinquish* his interest to the insurers for the benefit of the salvage, and would give them a letter of attorney to receive it.—Lord *Hardwicke* C. determined that there was no ground for an injunction in this case. He said,—"At the time of the trial, the insured knew that the ship was retaken.—The question

A ship is taken, and retaken, and sold in a distant country to pay the recaptors for the salvage, and the residue of the produce of the sales, remains in the court of admiralty there: The insured may abandon, and recover as for a total loss.

Pringle v. *Hartley*, in Chan. 1744, 3 *Atk.* 195.

tion ariſes on the ſtat. 18 *G.* II. with regard to the ſalvage. It has been ſaid, that there ought to be only half the loſs recovered on the policy; and, as to that, the act has made great alteration in the law of nations, with reſpect to recaptures. The carrying a ſhip *infra præſidia hoſtium*, or *ſi pernoctaverit* with the enemy, makes it the prize of the recaptor, as if it had been originally the ſhip of the enemy; but, by the act, the recapture reveſts the property in the owner. If there had been a ſalvage, it muſt have been deducted out of the money recovered under the policy; but if none came to the hands of the inſured, the jury could not take notice of it. It is uncertain whether the inſured will receive any thing or not: And if any thing be recovered, he muſt have had an allowance for his expenſes in recovering it. Therefore, being willing to *relinquiſh his intereſt* in the ſalvage, he ought to have recovered *the whole money inſured*. It would be miſchievous if it were otherwiſe; for then, upon a recapture, the inſured would be in a worſe ſituation than if the ſhip were totally loſt.

A ſhip, after throwing part of her cargo overboard in a ſtorm, and being diſabled from proceeding on her voyage till refitted, is captured & her crew taken out: But after being 8 days in poſſeſſion of the enemy, is recaptured and carried into an *Engliſh* port, upon which the inſured give notice to abandon. Before the ſhip can be refitted, the reſt of the cargo is ſpoiled:—This is a total loſs, and the inſur-

In the ſecond caſe, two inſurances were made, the one on the ſhip *David* and *Rebecca*, the other on goods on board, "At and from *Newfoundland* to her port of diſcharge in "*Portugal* or *Spain*, without the *Streights*, or *England*."—In an action upon the former policy, the plaintiff declared upon a total loſs by capture; upon the latter, the declaration alleged that divers quantities of fiſh and other merchandizes, were put on board; and averred that one fourth of the ſaid goods were neceſſarily thrown overboard in a ſtorm, to preſerve the ſhip and the reſt of the cargo; after which *jettiſon*, the ſhip and the remainder of the goods, were taken by the *French*.—It appeared on the trial, that the ſhip was taken on the 23d of *December* 1756; and the maſter, mates, and all the ſailors, except an apprentice and a landman, were taken out of her and carried to *France*. The ſhip remained in the hands of the *French eight days*, and was then retaken by a *Britiſh* privateer, and brought into *Milford Haven* on the 18th of *January*; and *immediate notice* was given by the inſured to the

the inſurers, with an offer to abandon. Before the capture, the ſhip, in a violent ſtorm, was ſeparated from her convoy, and ſo diſabled as to be incapable of proceeding on her voyage, without going into ſome port to refit. Part of her cargo was thrown overboard in the ſtorm, and the reſt ſpoiled, while the ſhip lay at *Milford Haven* after the offer to abandon, and before the ſhip could be refitted.—Upon this caſe, two queſtions were made; 1ſt. Whether this was a loſs by capture for which the inſurers were liable. 2dly. Whether, under all the circumſtances, the inſured had a right to abandon the ſhip to the inſurers after ſhe was carried into *Milford Haven*.—The court, upon great conſideration, were clearly of opinion, that the loſs was total by the capture; and that, after the voyage was defeated, the right which the owner had to obtain reſtitution of the ſhip and cargo, paying ſalvage to the recaptors, might be abandoned to the inſurers, after ſhe was brought into *Milford Haven*.—Lord *Mansfield* delivered the opinion of the court. The deciſion of the firſt point has been already mentioned in its proper place. (*a*) Upon the ſecond point, his Lordſhip ſaid,—"The ſingle queſtion upon which this caſe turns, is, whether the inſured had, under all the circumſtances, an election to abandon on the 18th of *January*. The loſs and diſability were in their nature total at the time they happened. During eight days the plaintiff was entitled to be paid by the inſurer as for a total loſs; and in the caſe of a recapture, the inſurer would have ſtood in his place. The ſubſequent recapture is, at beſt, a ſaving only of a ſmall part: *Half the value muſt be paid for ſalvage*. The diſability to purſue the voyage ſtill continued. The maſter and mariners were priſoners. The charter-party was diſſolved. The freight, except in the proportion of the goods ſaved, was loſt. The ſhip was neceſſarily brought into an *Engliſh* port. What could be ſaved might not be worth the expenſe neceſſarily attending it. The ſubſequent title to reſtitution ariſing from the recapture, at a great

ed may abandon.

Goſs v. *Withers*, 2 *Bur.* 683.

A title to reſtitution ariſing from recapture cannot take away a veſted right to abandon, if the ſhip be unfit to perform the voyage.

(*a*) Sup. 102.

great expenſe, (*a*) of a ſhip diſabled from purſuing her voyage, cannot take away a right veſted in the inſured at the time of the capture. But becauſe he cannot recover for any more than the loſs he has ſuſtained, he muſt abandon what may be ſaved. The better opinion of the books ſays,—"*Sufficit ſemel extitiſſe conditionem, ad beneficium aſſe-*"*curatori, de amiſſione navis; etiam quod poſtea ſequeretur* "*recuperatio: Nam per talem recuperationem non poterit præ-*"*judicari aſſecuratio.*" (*b*) I cannot find a ſingle book, ancient or modern, which does not ſay that, in caſe of a ſhip *being taken*, the inſured may demand as for a total loſs and abandon. What proves the propoſition moſt ſtrongly is, that by the general law, he may abandon in the caſe merely of arreſt, or an embargo, by a prince not an enemy. (*c*) Poſitive regulations in different countries, have fixed a preciſe time before the inſured ſhould, in that caſe, be at liberty to abandon. The fixing a preciſe time proves the general principle. Every argument holds ſtrongly in the caſe of the other policy, with regard to the goods. The cargo was, in its nature, periſhable, deſtined from *Newfoundland* to *Spain* or *Portugal*; and the voyage was as abſolutely defeated, as if the ſhip had been wrecked, and a third or fourth of the goods ſaved. No capture by the enemy can be ſo total a loſs as to leave no poſſibility of recovery. If the owner himſelf ſhould retake at any time, he will be entitled; and by the ſtat. 29 *G.* II. c. 34, § 24, if an *Engliſh* ſhip retake at any time, before the condemnation or after, the owner is entitled to reſtitution, upon ſtated ſalvage. This chance does not ſuſpend the demand upon the inſurer for a total loſs: But juſtice is done by putting him in the place of the inſured, in caſe of a recapture. In queſtions on policies, the nature of the contract, as an indemnity and nothing elſe, is always liberally conſidered. There might be circumſtances,

The inſured may abandon upon a mere arreſt or embargo by a prince not an enemy.

(*a*) By 29 *G.* II. c. 34, § 2, a moiety of the value of the captured ſhip was given to privateers, if the prize was above 96 hours in the poſſeſſion of the enemy. But now by 33 *G.* III. c. 66, § 42, the ſalvage in all caſes of recapture, by *privateers*, is fixed at *one-ſixth*.—(*b*) *Roccus*, n. 66.—(*c*) Vid. ſup. 434.

ſtances, under which a capture would be but a ſmall temporary hindrance to the voyage; perhaps none at all: As if a ſhip were taken, and, in a few days, eſcaped entire, and purſued her voyage. There are circumſtances under which it would be deemed an average loſs: If a captured ſhip be immediately ranſomed (*a*) by the maſter, and purſue her voyage: there, the money paid is an average loſs. And in all caſes the inſured may chooſe not to abandon. (*b*) In the ſecond part of the uſages and cuſtoms of the ſea, (a tranſlation from the *French*,) a treatiſe is inſerted called *Le Guidon*, in which, after mentioning the right to abandon upon a capture, it is added, "or any other ſuch diſturbance as defeats the voyage; or makes it not worth while, or not worth the freight, to purſue it." (*c*) I know that, in late times, the privilege of abandoning has been reſtrained for fear of letting in frauds: And the merchant cannot elect to turn what, at the time when it happened, was in its nature, but an average loſs, into a total one, by abandoning. But there is no danger of fraud in the preſent caſe. The loſs was total at the time it happened; and continued total, as to the deſtruction of the voyage. Nothing could be recovered, but upon payment of more than half the value, including the coſts. What could be ſaved of the goods might not be worth the freight, for ſo much of the voyage

When the capture proves but a ſmall temporary hindrance, the inſured cannot abandon.

As if the ſhip be immediately ranſomed, and purſues her voyage.

The inſured is in no caſe *obliged* to abandon.

He may abandon if the voyage be defeated or not worth purſuing.

But he cannot, merely by abandoning, turn a partial into a total loſs.

(*a*) Since this judgment was delivered, the ranſoming of ſhips captured by the enemy has been prohibited by ſtat. 22 *G.* III. c. 35, ſup. 432.—(*b*) *Le Guidon*, ch. 7, art. 1, ſays that abandonment depends on the will of the inſured, who may reſort to it as an *extreme remedy*.—(*c*) The paſſage in *Le Guidon* to which his lordſhip alludes, c. 7, § 1, is in theſe words: "Il eſt en liberté au marchand chargeur faire *delais* à ſes aſſureurs, c'eſt à dire, quitter et delaiſſer ſes droits, noms, raiſons, et actions, de la proprieté qu'il a en la marchandiſe chargée, dont il eſt aſſeuré, lors, et quand il advient naufrage du tout ou de partie, ou bien avarie qui excéde ou endommage la moitié de la marchandiſe, quand il y a priſe d'amis ou d'ennemis, arreſt de prince, ou autre tel diſtourbier en la navigation; ou telle empirance en la marchandiſe, qu'il n'y ait moyen l'avoir fait naviger à ſon dernier réſte, *ou qu'elle ne valut le frét, ou peu de choſe d'avantage.*"

voyage as they had gone when they were taken. The cargo, from its nature, muſt have ſold where it was brought in. The loſs, as to the ſhip, could not be eſtimated, nor the ſalvage of half be fixed, by a better meaſure than a ſale. In ſuch a caſe, there is no colour to ſay that the inſured might not diſentangle himſelf from unprofitable trouble and further expenſe, and leave the inſurer to ſave what he could. It might as well be argued that if a ſhip which had ſunk, was weighed up again, at a great expenſe, the crew having periſhed, the inſured could not abandon, nor the inſurer be liable, becauſe the body of the ſhip was ſaved.[a]

It is not univerſally true that becauſe a ſhip has once been captured the inſured may abandon at any time afterwards.

In the above caſe Lord *Mansfield* declared, "*that he could not find a ſingle book, ancient or modern, which did not ſay that, in caſe of a ſhip being taken, the inſured may demand as for a total loſs, and abandon.*—The unqualified terms in which this is expreſſed, ſoon gave riſe to a notion that the immediate conſequence of a capture was a *change of property* in the thing inſured, which veſted in the inſured a right to abandon when he pleaſed; and that he could not be diveſted of this right by any ſubſequent event. —That Lord *Mansfield* did not mean to be thus underſtood is obvious from the whole of his judgment in that caſe. But another caſe ſoon after occurred which afforded him an opportunity of explaining his own meaning in that judgment, and of ſettling and aſcertaining thoſe principles of law which have governed all the caſes to which they were applicable, from that time to the preſent.

The rule is that if the thing inſured be recovered before any loſs is paid, the inſured is only entitled to a partial or a total loſs, according to the final event.

In this caſe it was ſettled, after ſolemn argument, and upon great conſideration, that if the thing inſured be recovered before any loſs is paid, the inſured can only be entitled to a total or a partial loſs, according to the final event. This agrees with *Roccus*, who puts this queſtion: —*Aſſecurator qui jam ſolvit æſtimationem mercium deperditarum, ſi poſtea dictæ merces appareant et recuperatæ ſint, an poſſit cogere dominum ad accipiendas illas, et ad reddendam ſibi æſtimationem quam dedit?*—To this queſtion he anſwers thus: *Diſtingue: Aut merces, aut aliqua pars ipſarum appareant,*

pareant, et reſtitui poſſint ante ſolutionem æſtimationis; et tunc tenetur dominus mercium illas recipere, et pro illa parte mercium apparentium liberabitur aſſecurator: Nam qui tenetur ad certam quantitatem reſpectu certæ ſpeciei, dando illam, liberatur. Et etiam, quia contractus aſſecurationis eſt conditionalis, ſcilicet, ſi merces deperdantur: Non autem dicuntur deperditæ, ſi poſtea, reperiantur. Verum, ſi merces non appareant in illa priſtina bonitate, aliter fit æſtimatio; non in totum, ſed prout tunc valent. Aut vero poſt ſolutam æſtimationem ab aſſecuratore compareant merces, et tunc eſt in electione mercium aſſecurati, vel recipere merces vel retinere pretium. (a)

The caſe above alluded to, was an inſurance on the ſhip *Selby, valued* at 1200 l. and goods on board, from *Virginia* to *London*.—The ſhip ſailed on the 28th of *March* 1760, from *Virginia* for *London*, and on the 6th of *May* was captured by a *French* privateer. The captain and ſix men were taken out of the ſhip, and only the mate and one man left on board. The *French* put a prize-maſter and ſeveral men on board to carry the ſhip to *France*; but in the way thither, ſhe was retaken on the 23d of *May* by an *Engliſh* man of war off *Bayonne*, and ſent into *Plymouth*, where ſhe arrived the 6th of *June*. The plaintiff, at *Hull*, as ſoon as he was informed of what had befallen his ſhip, wrote on the 23d of *June* to his agent in *London* to acquaint the defendant, "that the plaintiff did "from thence abandon to him his intereſt in the ſaid "ſhip as to the 100 l. inſured by the defendant."—The agent, on the 26th of *June*, acquainted the defendant with the offer to abandon, to which the defendant anſwered, "that he did not think himſelf bound to take to "the ſhip; but was ready to pay the ſalvage, and all "other loſſes and charges that the plaintiff had ſuſtained "by the capture."—On the 19th of *Auguſt* the ſhip, which had ſuſtained no damage by the capture, was brought to *London* by order of the owners of the cargo and the recaptors, and the whole cargo delivered to the freighters, who paid the freight without prejudice.—The queſtion on

A ſhip is captured, and all the hands but the mate and one man taken out of her. After 17 days, ſhe is recaptured and ſent into an *Engliſh* port, where ſhe arrives a month after the capture: Yet, the voyage not being loſt, the inſured ſhall not be allowed to abandon after the ſhip's arrival.

Hamilton v. *Mendes*, 2 *Bur.* 1198, 1 *Bl.* 276.

(a) *Roccus*, h. t. n. 9, 50.

on this caſe was, whether the plaintiff, on the 26th of *June*, had a right to abandon, and to recover as for a total loſs.—The court determined that he had no right to abandon, and that he could recover as for average loſs only.—Lord *Mansfield*, in delivering the opinion of the court ſaid,—"The plaintiff has averred in his declaration, as the baſis of his demand for a total loſs, *that, by the capture, the ſhip became wholly loſt to him.* The general queſtion is, whether the plaintiff, who, at the time of his action, brought at the time of his offer to abandon, and at the time of his being firſt apprized of any accident having happened, had only, in truth, ſuſtained a *partial loſs*, ought to recover as for a *total one.* In ſupport of the affirmative, the counſel for the plaintiff inſiſted upon the four following points: 1, That, by the capture, *the property was changed*, and therefore the loſs total forever: 2, If the property was not changed, yet the *capture* was a total loſs: 3, That when the ſhip was brought into *Plymouth*, particularly on the 26th of *June*, the recovery was not ſuch as, in truth, changed the total, into an average, loſs: 4, Suppoſing it did, yet the loſs, having once been total, a right *veſted* in the inſured to recover the whole, upon abandoning; which right could never afterwards be *diveſted*, or taken from him, by any ſubſequent event.—As to the *firſt point*: If the change of property was at all material, as between the inſurer and the inſured, it would not be applicable to the preſent caſe; becauſe by the marine law received and practiſed in *England*, there is no change of property, in the caſe of a capture, till condemnation; and now by the act of parliament, (*a*) in caſe of a recapture, the *jus poſtliminii* continues for ever. Many writers argue, between the inſurer and the inſured, from the diſtinction, whether the property was, or was not, ſo changed by the capture, as to transfer a complete right from the enemy to a recaptor, or neutral vendee, againſt the former owner. But arbitrary notions concerning the change of property by capture, as between the former owner and

By the marine law, the property was not changed by the capture, till after condemnation. But ſince the 29 *G.* II c. 34, the *jus poſtliminii* continues for ever.

(*a*) 29 *G.* II. c. 34, § 24.

and recaptor or vendee, ought never to be the rule of deciſion, as between the inſurer and inſured, upon a contract of indemnity, contrary to the real truth of the fact. And therefore I agree, upon the *ſecond point*, that, by the capture, *while it continued*, the ſhip was totally loſt; but it muſt be admitted that the property, in caſe of recapture, never was changed, but returned to the former owner.—The *third point* depends, as every queſtion of this kind muſt, upon the particular circumſtances. It does not *neceſſarily* follow that, becauſe there is a recapture, therefore the loſs ceaſes to be total. If the voyage be abſolutely loſt, or not worth purſuing: If the ſalvage be very high: If further expenſe be neceſſary: If the inſurer will not engage, at all events, to bear that expenſe, though it ſhould exceed the value, or fail of ſucceſs: Under theſe, and many other like circumſtances, the inſured may diſentangle himſelf and abandon, notwithſtanding there was a recapture. The *Guidon*, (*a*) amongſt other inſtances of a total loſs, where the inſured may abandon, ſays, "*If the damage exceed half the value of the thing inſured; or if the voyage be loſt, or ſo interrupted that the purſuit of it is not worth the freight.*" But, in the preſent caſe, the voyage was ſo far from being loſt, that it had met with only a ſhort temporary obſtruction; the ſhip and cargo were both ſafe; the expenſe incurred did not amount to near half the value; and when the offer was made to abandon, the inſurer undertook to pay all charges and expenſes which the inſured ſhould be put to by the capture. The only argument to ſhew that the loſs had not, upon the recapture, ceaſed to be total, was built upon a miſtaken ſuppoſition, that the recaptor had a right to demand a ſale, and to put a ſtop to any further proſecution of the voyage. But that is not ſo. The property *returns* to the owner, pledged to the recaptors for the amount of the ſalvage. Upon paying this he is entitled to reſtitution. (*b*) The recaptor in this caſe had no right to ſell the ſhip. If they had differed about the value, the court of admiralty would have ordered a commiſſion

While the ſhip is in the hands of the enemy, ſhe is conſidered as totally loſt: Yet the property is not changed, but reveſts in the original owner upon a recapture.

But a recapture does not in all caſes prevent the loſs being total.

In what caſes a loſs may be ſaid to be total.

Upon a recapture the property returns to the original owner, pledged for the ſalvage.

(*a*) Ch. 7, § 1.—(*b*) Vid. 29 *G.* II. c. 34.

miſſion of appraiſement. It was the intereſt of all parties that the ſhip ſhould forthwith proceed to *London*. Had the recaptor oppoſed it, or affected delay, the court of admiralty would have made an order for bringing her to her port of delivery, upon reaſonable terms. Therefore it is clear that, on the 26th of *June*, the ſhip had ſuſtained no other loſs than a ſhort temporary obſtruction, and a charge which the defendant offered to pay.—As to the *laſt point*: The plaintiff's demand is for an indemnity. His action, then, muſt be founded on the nature of his damnification, as it really was, at the time of the action brought. It is repugnant, upon a contract of *indemnity*, to recover, as for a total loſs, when the final event has determined that the damnification is, in truth, an average loſs. Whatever undoes the damnification, in whole or in part, muſt operate upon the indemnity in the ſame degree. It is a contradiction in terms to ſay that an action will lie for an indemnity, when, upon the whole event, no damage has been ſuſtained."—To illuſtrate this, he put the caſe of an action of waſte brought againſt a tenant, after he had repaired; (*a*) and of an action brought by a ſurety, ſued to judgment againſt his principal, after the principal had paid the debt and coſts, and entered ſatisfaction on record; to ſhew that, by the common law, the injury being repaired before the action brought, is an anſwer to the action. He then ſaid;—"But, in the preſent caſe the notion of a veſted right in the plaintiff to ſue as for a total loſs, before the recapture, is only fictitious and not founded in truth: For the inſured is not obliged to abandon, in any caſe. He has an election. No right can veſt, as for a total loſs, till he has made that election. He cannot elect before advice is received of the loſs; and if that advice ſhews the peril to be over, and the thing inſured in ſafety, he cannot elect at all; becauſe he has no right to abandon when the thing is ſafe. Writers upon the marine law are apt to embarraſs general principles with the poſitive regulations of their own country:

Though there has at one time been a total loſs, yet the inſured cannot abandon after the *final event* has determined it to be only a partial loſs at the time of the action brought.

By the common law, an action will not lie upon an indemnity, if before the action brought, the injury has been repaired.

There is no *veſted* right to recover as for a total loſs, till the inſured, having a right to abandon, elects to do ſo.

(*a*) Vid. Co. Lit. 53, a.

try: But they ſeem all to agree that, if the thing be recovered before the money is paid, the inſured can only be entitled according to the final event. (*a*)—In the caſe of *Spencer* v. *Franco*, (*b*) though upon a *wager policy*, the loſs was held not to be total, after the return of the ſhip in ſafety; though ſhe had been ſeized, and long detained by the King of *Spain*, in a time of actual war—In the caſe of *Pole* v. *Fitzgerald*, (*c*) though upon a wager policy, the majority of the judges, and the Houſe of Lords held there was no total loſs; the ſhip having been reſtored before the end of the four months, the time for which ſhe was inſured.—The preſent attempt is the firſt that was ever made to charge the inſurer, as for a total loſs, upon an *intereſt* policy, after the thing was recovered: And it is ſaid, the judgment in *Goſs* v. *Withers* gave riſe to it."—Here he recapitulated the grounds of the judgment in that caſe, (*d*) and proceeded thus,—"But it is ſaid that though the caſe of *Goſs* v. *Withers* was entirely different, ſome part of the *reaſoning* warranted the propoſition now inferred by the plaintiff from it. The great principle relied upon was, that, as between the inſurer and inſured, the contract being an indemnity, the *truth* of the facts ought to be regarded; and therefore there might be a total loſs by a capture, which could not operate a change of property; and a recapture ſhould not relate by fiction, like the *Roman jus poſtliminii* as if the capture had never happened, unleſs the total loſs was in truth recovered. This reaſoning proved, *è converſo*, that if the thing, *in truth* was ſafe, no artificial reaſoning ſhall be allowed to ſet up a total loſs. The words quoted at the bar were certainly uſed, (*e*) "that there is no book, "ancient or modern, which does not ſay that, in caſe of "the ſhip being taken, the inſured may demand as for a "total loſs, and abandon." But the propoſition was applied to the ſubject matter, and is certainly true, provided the capture, or the total loſs occaſioned thereby, *continue* to

If the thing inſured be recovered before the loſs is paid, the inſured can only recover according to the final event.

If a ſhip be recovered after a long detention, it is not a total loſs, even upon a wager policy

A paſſage in the judgment of *Goſs* v. *Withers*, explained

(*a*) Vid. *Roccus*, Not. 50, ſup. 490.—(*b*) Sup. 441.—(*c*) 5 Bro. Parl. Ca. 131, inf. 504.—(*d*) Sup. 487.—(*e*) Vid. ſup. 488.

to the time of abandoning, and bringing the action. The caſe then before the court did not make it neceſſary to ſpecify all the reſtrictions. But I will read to you *verbatim*, from my notes of the judgment then delivered, what was ſaid, to prevent any inference being drawn beyond the caſe then determined."—Here he read ſeveral paſſages from his argument in *Goſs* v. *Withers*, which is fully ſet forth in the foregoing account of that caſe, and then proceeded; —" From this way of reaſoning it by no means followed, that if the ſhip and cargo had, by the recapture, been brought ſafe to the port of delivery, without having ſuſtained any damage at all, the inſured might abandon. But without dwelling longer upon principles or authorities, the conſequences of the preſent queſtion are deciſive. It is impoſſible that any man ſhould *deſire* to abandon, in a caſe circumſtanced like the preſent, but for one of two reaſons: Either becauſe he has *over-valued*; or becauſe the *market has fallen* below the original price. The only reaſons which can make it the intereſt of the party to *deſire* to abandon, are concluſive againſt allowing it. If the valuation be true, the plaintiff is indemnified by being paid the charge he has been put to by the capture. If he has over-valued, he will be a gainer, if he be permitted to abandon; and he can only deſire it becauſe he has over-valued. This was avowed upon the firſt argument; and that very reaſon is concluſive againſt its being allowed. The inſurer, by the marine law, ought never to pay leſs, upon a contract of indemnity, than the *value* of the loſs; and the inſured ought never to receive more. Therefore, if there were occaſion to reſort to that argument, the conſequence of the determination would alone be ſufficient upon the preſent occaſion. But, upon *principles*, this action could not be maintained as for a total loſs, if the queſtion were to be judged by the ſtricteſt rules of the common law: Much leſs can it be ſupported for a total loſs, as the queſtion ought to be decided by the large principles of the marine law, according to the ſubſtantial intent of the contract, and the real truth of the fact. The property, and daily negociations

When the ſhip is ſafe and the voyage is not loſt, the inſured ought not to be permitted to abandon.

The inſurer ought never to pay leſs than the *value* of the loſs, nor the inſured receive more.

ciations of merchants ought not to depend upon ſubtleties and niceties; but upon rules eaſily learned and eaſily retained; becauſe they are the dictates of common ſenſe, drawn from the truth of the caſe. If the queſtion depend upon the fact, every man can judge of the nature of the loſs, before the money be paid: But, if it depend upon *ſpeculative refinements*, from the law of nations, or the *Roman jus poſtliminii*, concerning the change, or reveſting, of property; no wonder merchants are in the dark, when *doctors* have differed upon the ſubject from the beginning, and have not yet agreed.—To obviate too large an inference being drawn from this determination, I deſire it may be underſtood, that the point here determined is, *That the plaintiff upon a policy can only recover an indemnity, according to the nature of his caſe, at the time of the action brought, or, at moſt, at the time of his offer to abandon.* We give no opinion, how it would be, in caſe the ſhip and goods were reſtored in ſafety between the offer to abandon and the action brought, or between the commencement of the action and the verdict: And particularly I deſire that it may not be inferred, that in caſe the ſhip or goods ſhould be reſtored, *after the money is paid as for a total loſs*, the inſurer could compel the inſured to refund the money and take the ſhip or goods. That caſe is totally different from the preſent, and depends throughout, upon different reaſons and principles. Here, the event had fixed the loſs to be an average loſs only, before the action brought, before the offer to abandon, and before the plaintiff had notice of any accident; conſequently before he could make an election. Therefore, under theſe circumſtances, we are of opinion that he cannot recover for a total loſs, but for an average loſs only; the amount of which is aſcertained by the jury.—The judgment muſt be entered up as for the average loſs ſtated in the caſe;" viz. 10 l. *per cent.*

Queſtions of inſurance ſhould not depend upon ſubtleties, but on plain and eaſy rules, the dictates of common ſenſe.

The inſured can only recover an indemnity for his loſs at the time of the action brought, or offer to abandon.

If after a total loſs has been paid, the ſhip be reſtored, the inſured ſhall not be obliged to refund.

The following caſe will ſhew that if, upon a recapture, the captain find that the voyage cannot be purſued, and, acting fairly for the benefit of all concerned, he ſell the ſhip and cargo to pay the ſalvage, and thereby put an end to

If upon a recapture the captain ſell the ſhip and cargo, as being the beſt to be done for all concerned; the inſured may abandon.

to the voyage; the insured may abandon, and recover as for a total loss.

A ship and freight were insured from *Montserrat* to *London*:—The ship was taken on her voyage on the 23d of *May* by two *American* privateers, who took the captain and all the crew, and part of the cargo (which consisted of sugars,) out of her; and also took away the rigging. She was afterwards retaken and carried into *New York*, where the captain arrived on the 23d of *June*, and, taking possession of the ship, found that part of what had been left on board of the cargo, was washed overboard; that 57 hogsheads of what remained was damaged, and that the ship was leaky, and could not be repaired without unloading her entirely. The owners had no store-house at *New York*. No sailors were to be had there; and the only method he had of paying the salvage, was by sale of the ship or part of the cargo. He did not know of the insurance. The expense of repairing the ship would have exceeded the freight by more than 100 l. There was an embargo on all vessels at *New York* till the 27th of *December*, and his ship ought to have arrived at *London* in *July*. Upon consulting with his friends at *New York*, he resolved to sell the ship and cargo, as the most prudent step for the interest of his employers. The cargo was accordingly sold and paid for. The ship was also contracted for; but the person who agreed to buy her ran away; and the captain left her in a creek near *New York*, and returned to *England*, where he arrived in the *February* following, and informed the plaintiff of what he had done. The plaintiff immediately claimed from the underwriters as for a total loss, and offered to abandon.—The underwriters resisted this claim. The insured brought an action on the policy, and went for a total loss. The defendant insisted that it was only an average loss.—Lord *Mansfield*, who tried the cause, told the jury, that if they were satisfied *that the captain had done what was best for the benefit of all concerned*, they must find as for a total loss. The jury found a verdict according to this direction; and upon a motion for a new trial, the court were clearly of opinion

A ship and goods are captured and recaptured, and put in possession of the captain, who disposes of both and puts an end to the voyage; and in so doing, acts to the best of his judgment for the benefit of all concerned: The insured may *abandon*, and demand as for a *total loss*.

Milles v. *Fletcher*, *Doug.* 219.

opinion that the plaintiff had a right to *abandon*, and claim as for a total loſs.—Lord *Mansfield* ſaid;—"On the trial of this cauſe, it did not appear to me that there was any queſtion of law, and no caſe was aſked for. It was impoſſible to aſk for one till the facts were aſcertained; and when aſcertained, it would have been impoſſible to ſtate them in any way which could have left a doubt on the law. It was not contended that a capture *neceſſarily* amounts to a total loſs, as between inſurer and inſured; nor, on the other hand, that, on a capture and recapture, there may not be a total loſs, though there remains ſome material tangible part of the ſhip and cargo. Neither was it contended that the captain has an arbitrary power, by his own act, to make the loſs either partial or total, as he pleaſes. The queſtion is ſimply this, whether the conſequences of the capture were ſuch as, notwithſtanding the recapture, occaſioned a *total obſtruction* of the voyage, or only a *partial ſtoppage*, as in the caſe of *Hamilton* v. *Mendez*. (*a*) In that caſe, and in *Goſs* v. *Withers*, (*b*) great ſtreſs was laid on the ſituation of the ſhip and cargo, at the time when the inſured *had notice*, at the time of the offer *to abandon*, and at the time of the *action brought*. No caſe ſays that the bare exiſtence of the hulk of the ſhip prevents the loſs being total. The caſes where the inſured may abandon are, "If the "voyage be loſt, or not worth purſuing;—If the ſalvage "be high;—If further expenſe be neceſſary;—If the "inſurer will not, at all events, undertake to pay that "expenſe, (*c*) &c." Here, at the time of the capture, there were no hopes of a recovery; no friend's ſhip in ſight; no means of reſiſtance; all the crew taken out, and part of the cargo; and the rigging alſo taken away. When the ſhip was retaken and brought to *New York*, it ſtill continued a total loſs. Neither the inſured nor the inſurers, had any agent in the place. The court of admiralty muſt have proceeded *ſecundum æquum et bonum*, and might have ſold her for the benefit of thoſe concerned.

A capture does not neceſſarily amount to a total loſs; nor does a recapture prevent its being total.

In what caſes the inſured may abandon.

When

(*a*) Sup. 491.—(*b*) Sup. 486.—(*c*) Vid. ſup. 493.

When the inſured firſt had notice and offered to abandon, and when the action was brought, it was ſtill a total loſs. The voyage was abandoned, the cargo ſold, and the ſhip left to be ſold. The only anſwer the defendant makes, or can make to this, is, that the loſs was total, indeed, but the captain made it ſo by his improper conduct; for that, on his taking poſſeſſion of the ſhip, the loſs became partial, and that he ought to have purſued the voyage. But was this defence true in fact? The captain, when he came to *New York*, had no expreſs order, but he had an implied authority, from both ſides, to do what was right and fit to be done, as none of them had agents in the place. And for the conſequences of whatever it was right for him to have done, if it had been his own ſhip and cargo, the underwriter muſt anſwer; becauſe this is within the contract of indemnity. Suppoſe there had been no inſurance, what ought the captain to have done? 1. As to the *cargo:* According to the courſe of the voyage, the ſhip ſhould have arrived at *London* in *July*. On the capture, part had been taken out, ſome had been waſhed overboard, ſome damaged, and the whole, from the leakineſs of the veſſel, in a periſhable ſtate. There were no ſtore-houſes, nor could the ſhip proceed in the ſtate ſhe was in. The crew was gone, and an embargo laid on till *December*. What! ſhall a cargo, which was intended to arrive in *London* in *July*, be kept in a periſhable ſtate at *New York*, in a leaky veſſel, till *December?* 2. As to the *ſhip:* It was certainly better to ſell her, than to bring her to *London*. There was no crew belonging to her, and ſhe had no cargo. Even if all the cargo had been left, the expenſe of repairs would have exceeded the freight. If ſhe had been brought home, the expenſe of bringing her might have been more than what ſhe would have ſold for in *London*. It has been ſaid, that the damage would not have fallen on the underwriters; but the argument drawn from thence is a fallacy, for that circumſtance goes to determine it to be the intereſt of the inſured to abandon the voyage. The queſtion is, what did the owner ſuffer by the capture; and it appears that he ſuffered

The captain has an implied authority to do the beſt he can for the benefit of all concerned, and the inſurer is bound by his acts.

ſuffered ſo much that it was not worth while to purſue the voyage. The whole voyage was loſt. As the captain did not know of the inſurance, he had no temptation to give the turn of the ſcale to the one ſide or the other. I left it to the jury to determine whether what the captain had done, was *for the benefit of the concerned.* If they had found that it was, in words, where would have been the queſtion of the law?" (*a*)

If the captain purchaſe the ſhip from the captors for account of his owners; the money paid, being in nature of ſalvage, is only a partial loſs.

So, if the ſhip be ſold by the captors, and the captain acting as agent for the owners, purchaſe the ſhip on their account; this ſhall be conſidered as a recovery of the ſhip for the owners, and the money thus paid, as ſalvage; and if the voyage can be proſecuted, this is only a partial, and not a total, loſs.

Thus:—A ſhip, inſured for ſix months, was captured and carried into *Charleſtown*, where ſhe remained upwards of a month, and then was ſold by the captors, and purchaſed by the captain for account of the original owners. —In an action on the policy, the defendant paid 60 l. *per cent.* into court, as for a partial loſs.—The plaintiff contended, that the ſhip having been captured and ſold by the captors, after ſhe had been a month in their poſſeſſion, this was a total loſs.—Lord *Kenyon*, who tried the cauſe, held that this was only to be conſidered as a partial loſs, and that the owners could not abandon. He conſidered the captain as agent for the owners, recovering the veſſel upon their account, and the price as a kind of ſalvage, the amount of which would be the loſs ſuſtained, and which only conſtituted an average loſs. He admitted, however, that when the ſhip had been captured and was carried into port, in the enemy's poſſeſſion, the inſured might, at that period, have abandoned. But not having abandoned, till after the ſhip was recovered, they could now only go as for an average loſs.—The jury found a verdict according to this direction.

M'Maſters v. *Shoolbred*, Eſp. Rep. 237.

Having

(*a*) In *Plantamour* v. *Staples*, ſup. 378. Mr. Juſtice *Buller* adopts this doctrine, that the inſurers are bound by the acts of the captain when he does what *he deems beſt* for the benefit of all concerned.

Having laid before the reader the authorities upon queſtions of abandonment, upon loſſes by capture, and arreſt of princes; we will now proceed to conſider,

2. *Of the right of abandoning in other caſes.*

Shipwreck is always conſidered as a total loſs.

Shipwreck is generally a total loſs. What may be ſaved of the ſhip or goods is ſo uncertain, and depends ſo much on accident, that the law cannot diſtinguiſh this from the abſolute deſtruction of the whole. The wreck of the ſhip may remain and may be ſaved, but the ſhip is loſt. A thing is ſaid to be deſtroyed when it is ſo broken, disjointed, or otherwiſe injured, that it no longer exiſts in its original nature and eſſence. So the goods may remain; but if no ſhip can be procured in a reaſonable time, to carry them to their place of deſtination, the voyage is loſt, and the adventure fruſtrated.

But a ſtranding is not, of itſelf, deemed a total loſs.

But the mere *ſtranding* of the ſhip is not, of itſelf, deemed a total loſs, ſo as to entitle the inſured immediately to abandon. If by ſome fortunate accident, by the exertions of the crew, or by any borrowed aſſiſtance, the ſhip be got off and rendered capable of continuing her voyage, it is not a total loſs, and the inſurers are only liable for the expenſes occaſioned by the ſtranding. It is only where the ſtranding is followed by *ſhipwreck*, or in any other way renders the ſhip incapable of proſecuting her voyage, that the inſured is entitled to abandon. (*a*)

No partial loſs, however great, can be turned into a total loſs.

It is a rule that, to entitle the inſured to abandon, there muſt have been, at ſome period of the voyage inſured, or during the continuance of the riſk, a total loſs; and the following caſes will ſhew that no partial loſs, however great, occaſioned by the perils of the ſea, can be turned into a total loſs.

A ſhip performed her voyage, but was ſo damaged as not to be worth repairing; yet, as the damage was only

An inſurance was made on the ſhip *Friendſhip* from *Wyburgh* to *Lynn*.—In an action on the policy, the defendant pleaded a tender of 48 l. The plaintiff claimed as for a total loſs, and upon the trial of the cauſe, it appeared that

(*a*) Vid. *Emerig.* tom. 2, p. 180.

that the ſhip had ſuffered ſo much in her voyage, that when ſhe arrived at *Lynn*, ſhe was not worth repairing. The damage, however, ſuſtained by the ſhip, did not exceed 48 *per cent.* the ſum which the defendant had paid into court upon his plea of tender.—Upon this caſe the defendant inſiſted that this was a *partial* and not a total loſs, and that therefore the plaintiff had no right to abandon.—The court were clearly of opinion that the owner cannot abandon, but in the caſe of a total loſs, and that they could not determine that there had been a *total loſs*, when the jury found that there was only a loſs of 48 l. *per cent.*—Mr. Juſtice *Aſhurſt* ſaid,—It will be making the inſurers anſwerable for the goodneſs of the ſhip, if they are held liable for more than 48 *per cent.* It is ſtated that the ſhip was not worth repairing; but *non conſtat* that, if the ſhip had not received any damage during the voyage, ſhe would have been worth repairing: And though ſhe was not in a ſound ſtate, yet ſhe had been 24 hours in ſafety; and the jury having aſcertained the amount of the damage ſhe has ſuſtained, I cannot ſay that the plaintiff ought to recover more."—Mr. Juſtice *Buller* ſaid,—"Nothing can be better eſtabliſhed than that the *owner* of a ſhip can only abandon in the caſe of a total loſs happening *at ſome period or other of the voyage;* which cannot have happened in this caſe, as the jury have expreſsly found that the loſs amounted to 48 l. *per cent.* In the caſe of *Jenkins* v. *Mackenzie*, though the ſhip was brought into port, yet the capture, *as between the inſurer and the inſured*, was a total loſs. The true way of conſidering this caſe is, that it was an inſurance *on the ſhip, for the voyage;* and if either the ſhip or the voyage be loſt, it will be a total loſs; but here neither was loſt. The caſe of *Hamilton* v. *Mendez* (*a*) is deciſive."

eſtimated at 48 *per cent.* this is not a total loſs, and the inſured cannot abandon.

Cazalet v. *St. Barbe*, 1 T. R. 187.

If a ſhip in her voyage receive great damage, but arrive at her port of deſtination, and remain 24 hours in ſafety; this cannot be a total loſs.

So, where the ſhip *Prince of Wales* was inſured, "in port or at ſea, for ſix months from the 18th of *July* 1777."—The ſhip was in government ſervice bound from *Cork* to *Quebec*. She arrived there; but the ſeaſon being ſo far advanced before ſhe was ready to return, ſhe was removed

A ſhip, inſured for 6 months, receives a great injury within the time: and the captain, being unable to get her repaired, ſells her, *after the time:* This is not a

(*a*) Sup. 491.

total, but a partial loſs; the ſhip being only *damaged*, not *loſt*.

Furneaux v. *Bradley*, B. R. Eaſt. 20 *G.* III. *Park*, 166.

removed into the baſon; from whence on the 19th of *November* ſhe was driven by a field of ice, and damaged by running on the rocks. Her condition could not be examined into, till the *April* following, after the expiration of the policy. She was then found to be bulged, and much injured, but not irreparably ſo. In the progreſs of the repair, difficulties aroſe for want of materials; and the captain, after conſulting the merchants and agent in the place, ſold her. An account was made up charging the inſurers with the whole amount, and crediting them for the money for which the ſhip was ſold, as ſalvage.—Lord *Mansfield*, at the trial, ſaid, "The great point in the caſe is, whether this be a total loſs by this accident. It is a new queſtion, upon which I ſhall reſerve a caſe for the opinion of the court."—A caſe being reſerved, the court, after argument, were of opinion that the ſhip ſhould be conſidered as *damaged*, on the 19th of *November*, but not *totally loſt*.—Lord *Mansfield* ſaid, the juſtice of the caſe ſeemed to be that the loſs in *November* ſhould be taken as an *average*, not as a *total* loſs.

A privateer, inſured for 4 months *free from average*, is forced into port by a mutiny of the crew, but is in ſafety at her port after the four months are expired: The inſured can recover for no loſs—not for an average loſs, becauſe the inſurance was *free from average*; and not for a *total loſs*, becauſe it was only an average loſs.

Fitzgerald v. *Pole*, 5 Bro. Parl. Ca. 131, *Willes*, 641.

So, where the *Good Fellow* privateer was inſured, "At "and from *Jamaica* on a cruiſe for four months, valued "at 1000 l. *without farther account and free from average*." —Upon a ſpecial verdict it appeared, that while the privateer was on her cruiſe, and within the four months, the crew mutinied againſt the captain and his officers, and by force carried the ſhip to *Jamaica*; and before her arrival there, by force, ſeized the boat, fire arms, and cutlaſſes, carried them off and deſerted the ſhip; whereby the voyage and cruiſe were prevented and loſt for the remainder of the four months: That the ſhip arrived at *Jamaica*, but not till after the end of the four months.—Upon this caſe the King's Bench gave judgment for the plaintiff.—Upon a writ of error, the Exchequer Chamber unanimouſly reverſed that judgment, and the Houſe of Lords confirmed the judgment of reverſal; being of opinion, with the majority of the judges, that the inſurer, being, by the terms of the policy, free from all average, the plaintiff could not be entitled to recover but in caſe of a total

total loſs; and the ſhip being found, by the ſpecial verdict, to be in good ſafety, at her proper port, at and after the end of the four months, for which the inſurance was made, there could be no loſs. (*a*)

If, by any accident or misfortune, the ſhip be prevented from proceeding on her voyage, and the voyage be thereby loſt; this is a total loſs, not only of the ſhip and freight, but alſo of the cargo, if no other ſhip can be procured to carry it to its port of deſtination.

But if the voyage be loſt, from whatever cauſe, it is a total loſs.

Thus:—An inſurance was made on the ſhip *Grace*, her cargo and freight, "At and from *Tortola* to *London*; "warranted to depart on or before the 1ſt of *Auguſt* 1781. "The ſhip valued at 2,470 l. the cargo at 12,400 l. "and the freight at 2,250 l.; at 25 guineas *per cent.* "to return 10 *per cent.* if ſhe departed with convoy "from the *Weſt Indies*, and arrived; *the ſhip, freight,* "*and goods warranted free of particular average.*"—The ſhip and cargo had been a *Dutch* prize, condemned at *Tortola*; but during four or five months that ſhe ſtaid there, was never unloaded. On the 1ſt of *Auguſt* the whole fleet of merchantmen, with their convoy, got under weigh; but not being able to get clear of the iſlands that day, they came to an anchor during the night, and the next day cleared the iſlands. About 10 o'clock that day, ſeveral ſqualls of wind aroſe, which occaſioned the ſhip to ſtrain and make water ſo faſt, that the pumps were obliged to be worked; and on the 3d the captain made a ſignal of diſtreſs, in conſequence of which ſhe was obliged to return to *Tortola*. On her arrival there, the captain made his proteſt; and a ſurvey was had, by which

On a voyage from *Tortola* to *London*, the ſhip by ſea damage is obliged to put back on the third day, and cannot be repaired there, & no other ſhip can be got for the cargo:—This is a total loſs of the ſhip, freight, and cargo; and the inſured may abandon.

Manning v. *Newnham*, B. R. Tr. 22 *G.* III. MS. S. C. *Park*, 169.

(*a*) It has been ſaid (*Park*, 170) that caſes like the preſent can never ariſe again, becauſe it originated in a wager policy, which is prohibited by law. The policy, in this caſe, can ſcarcely be ſaid to have been a wager policy: It was rather a valued policy, free from average: But it muſt be recollected that there is in the ſtat. 19 *G.* II. c. 37, a proviſo to exempt privateers from the operation of the firſt clauſe, which prohibits inſurances intereſt or no intereſt; and therefore the policy in this caſe would be a good and valid policy at this day.

which the ſhip was declared unable to proceed to ſea with her cargo upon a *London* voyage, and that ſhe could not be repaired in any of the *Engliſh* iſlands in the *Weſt Indies*. There was no evidence of any ſpecial damage to the cargo, which was ſold for within 700 l. of the value. The owners purchaſed two-thirds of it; the greateſt part of which might have been ſent home and ſold at a great profit. The inſured claimed as for a total loſs on the ſhip, cargo, and freight. At the trial, though the cargo was warranted free from average, yet it ſeemed dangerous to permit the inſured to abandon, and thus turn an average into a total loſs. The jury, however, thought the inſured entitled to what he claimed, and found accordingly.—Upon a motion for a new trial, the court, upon full conſideration, were of opinion that the verdict was right and ought to ſtand.—Lord *Mansfield* ſaid, "At the trial, my prejudices were in favour of the underwriters; but upon better conſideration, I agree with the reſt of the court that the jury did right. *If, by the perils inſured againſt, the voyage be loſt and gone, it is a total loſs, otherwiſe not.* The ſhip received an irreparable hurt within the policy, which drove her back to *Tortola*, where only two ſhips could be had, both together not capable of taking the whole of the cargo on board. The voyage was ſo completely loſt, that no ſhip could be got; and the inſured was unable to ſend that part of the goods which they had purchaſed, forward to *England*; and yet nobody bought but to ſend to *England*. If the voyage could have been continued in another ſhip, there might have been freight *pro rata*. But it was admitted that there was a total loſs on the freight, becauſe the ſhip could not perform her voyage; and the inſured were not to wait till ſhips could be had. The ſame argument applies to the ſhip and cargo. This is a contract of indemnity, and the inſurance is that the ſhip ſhall come to *London*. Introducing nice diſtinctions is inconvenient and dangerous: Upon turning this caſe in every view, the court are of opinion that the voyage was totally loſt; and this is the ground of our determination."

If

If a cargo be damaged in the courſe of the voyage, and it appear that what has been ſaved is leſs in value than the amount of the freight; this is clearly a total loſs. This doctrine is warranted not only by the paſſage from *Le Guidon* which has been already cited, but alſo by the opinion of Lord *Mansfield* in the caſe of *Goſs* v. *Withers*, (*a*) and by that of Lord *Hardwicke* in the following caſe.

If a cargo be damaged ſo as to be reduced in value to leſs than the freight, it will be a total loſs.

An action was brought on a policy of inſurance upon corn for 200 l. but of the value of 217 l., the defendant having ſuffered judgment to go by default, upon the execution of a writ of inquiry, before Lord *Hardwicke*, it appearing that the corn being damaged, was ſold for only 67 l., and the freight came to 80 l.—Upon this, the queſtion was whether, as the freight exceeded the ſalvage, this was not to be conſidered as a total loſs. For the plaintiff it was inſiſted that he ought not to be in a worſe ſituation than if his corn had gone to the bottom; for then he would have had no freight to pay; but now that the voyage has been performed, whereby freight is become due, he has a right to apply the ſalvage to diſcharge it. It was proved to be the uſage that, where the ſalvage exceeds the freight, to deduct the freight out of the ſalvage, and make up the loſs upon the difference.—For the defendant it was inſiſted that, as his inſurance was upon the corn, and the whole did not periſh, he ought, in making up the loſs, to deduct the ſalvage: But no inſtance could be ſhewn, on either ſide, of an adjuſtment where the freight exceeded the ſalvage.—The Chief Juſtice was of opinion that, within the reaſon of deducting the freight, where the ſalvage exceeds it, the plaintiff, in this caſe, where it fell ſhort, was entitled to have it conſidered as a total loſs. The jury found according to this direction. (*b*)

Boyfield v. *Brown*, at N.P. 2 Str. 1065.

In

(*a*) Vid. ſup. 486.—(*b*) This caſe was before the year 1749, when the common memorandum was introduced into policies, that corn, &c. ſhould be free from average, unleſs general, or the

When the inſured may abandon by the law of *France.*

In *France* the diſtinction is this: In caſe of ſhipwreck, the inſured may abandon, though the goods be recovered and carried to their place of deſtination, becauſe goods thus ſaved are generally in a bad and unmarketable condition. But if the ſhip become innavigable, the inſured cannot abandon the goods, if by any other ſhip they may be conveyed in time to their place of deſtination. (*a*)

Sect. 2.

Within what Time the Inſured may abandon.

Some time ſhould be fixed when the degree of the inſurer's reſponſibility ſhould be aſcertained.

IT ſeems reaſonable and neceſſary that ſome time ſhould be fixed when the degree of reſponſibility of the underwriter ſhould be aſcertained; and therefore in ſeveral maritime ſtates on the continent, poſitive regulations have been eſtabliſhed, limiting the time, after a loſs has happened, within which the inſured may abandon. In *France*, *Spain*, and *Holland*, the times are limited by law, according to the diſtance of the place where the loſs happens, within which the abandonment muſt be made. (*b*)

In *England*, the inſured, as ſoon as he is informed of a total loſs, muſt elect to abandon or not. If he mean to do ſo, he muſt give reaſonable notice to the inſurers; otherwiſe he will wave his right to abandon.

But the times thus limited muſt often prove either too long or too ſhort, and frequently occaſion great loſs and inconvenience either to the inſured or the inſurer. In *England* we have no ſuch poſitive regulation, nor any time limited by law for abandoning: Our courts have laid down a rule, which ſeems better ſuited to the practice of commerce, and more likely to prevent frauds, than thoſe we have juſt alluded to. This rule is, that as ſoon as the inſured receives advice of a total loſs, he muſt make his election whether he will abandon or not: If he determines to abandon, he muſt give the underwriters notice of this *within a reaſonable time* after the intelligence

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the ſhip be ſtranded. Vid. *Maſon* v. *Scurray*, ſup. 143, where in a ſimilar caſe, Lord *Manſfield* held it to be but a partial loſs, for which, as that caſe was upon a policy with the common memorandum, the inſurer was not liable.

(*a*) *Emerig.* tom. 2, p. 187, 188.—(*b*) Vid. Ord. de la mar. h. t. art. 48, 49; 2 *Mag.* 416.

gence arrives; and any unneceſſary delay in giving this notice will amount to a waver of his right to abandon; for unleſs the owner does ſome act, ſignifying his intention to abandon, it will be only a partial loſs, whatever may be the nature of the caſe, or the extent of the damage. (*a*) This rule, which has been long eſtabliſhed, is analogous to the general principle of the common law, which requires that all notices of acts affecting the intereſts of third perſons ſhall be given *within a reaſonable time.* In the following caſe this doctrine was firſt explicitly laid down by the court of King's Bench.

A ſhip being taken, the captor takes out her ſtores and part of her crew, and ſets her at liberty: This obliging her to return into the neareſt port, her voyage is loſt, and her cargo, which is inſured, is ſold by an agent, who becomes inſolvent. After three years, in which the inſured adopts the acts of the agent, he ſhall not be at liberty to abandon, and throw the loſs occaſioned by the failure of the agent on the underwriters. He might have abandoned, but he ought to have done ſo immediately on receiving intelligence of the loſs. Not having done ſo, he gives credit to the agent.

An inſurance was made on goods, "from *Jamaica* to "*London.*"—The ſhip was captured by an *American* privateer; and in a few days afterwards the captor, having ſtripped her of her ſtores and part of her rigging, and having taken out ſome of her hands, ſet her at liberty. There was a clauſe in the policy to exempt the underwriters from average loſſes under 3 *per cent:* And the part of her cargo taken out did not amount to that ſum. In conſequence of the ſhip's loſing a part of her crew, it became impoſſible for her to purſue her voyage, and ſhe was obliged to bear away for *Charleſtown*, where ſhe was put into the hands of one *Cruden*, a part-owner, who ſold the cargo, but remitted none of the money home. In his books, he gave the *underwriters* credit for the amount. At the time of the ſale, he was in bad circumſtances, and afterwards became inſolvent. It appeared, however, that the other owners looked to *Cruden* for two or three years for payment; during all which time, no notice of abandoning was given by the inſured to the underwriters. In an action on the policy, the defendant paid a ſum of money into court, being the amount of the average loſs.—Two queſtions were made at the trial: *Firſt*, whether the plaintiffs were entitled to recover as for a *total loſs*. Upon this, Mr. Juſtice *Buller*, who tried the cauſe, was of opinion that, as there had been a capture, which, for a time, had occaſioned a total loſs, the owners had an option to abandon, or not, as they pleaſed:

(*a*) Per *Buller*, J. 1 T. R. 616.

Mitchell v. *Edie*, 1 T. R. 608.

pleaſed: But, if they had choſen to abandon, they ought to have done it immediately, upon receiving intelligence of the loſs; and, as they had not done ſo, but had looked to *Cruden*, as their agent, for payment, they had waved their right to abandon, and could only recover as for a *partial loſs*. The ſecond queſtion aroſe out of the particular circumſtances of the caſe, not properly belonging to this branch of the ſubject, and, indeed, of no general importance. The jury found a verdict for the defendant.—Upon a motion for a new trial, the court (*a*) were clearly of opinion that the plaintiff was not entitled to recover.—Mr. Juſtice *Aſhurſt* ſaid;—"The general rule is, that where any part of the property inſured has been ſaved, the inſured cannot recover as for a total loſs, unleſs he make his election to abandon, and give reaſonable notice to the underwriters of his intention. But it is contended that the inſured never wave their right to abandon while they are managing in the beſt manner they can for the benefit of all concerned: And that argument is grounded on the common clauſe inſerted in every policy, whereby the inſured is authorized, "to ſue, labour and travail, in and about the defence, "ſafeguard, and recovery of the goods, &c.: without "prejudice to the inſurance." Now this clauſe does not warrant the poſition to the extent contended for. The meaning of it is, that, till the inſured have been informed of what has happened, and have had an opportunity of exerciſing their own judgment, no act done by the maſter ſhall prejudice their right of abandoning: And this is reaſonable, becauſe the loſs may happen at a great diſtance, ſo that the inſured cannot exerciſe their judgment immediately: It is therefore neceſſary that the maſter, who is on the ſpot, ſhould do the beſt he can. But the inſured are bound to decide, and ſignify their election to the underwriters the firſt opportunity; for though the perſon who takes upon him to act on the occaſion for the benefit of all concerned, is not the agent of the inſured, yet if, upon receiving notice

The meaning of the clauſe in the policy which enables the inſured to labour for the recovery of the goods without prejudice to the inſurance.

The inſured is bound to decide and give notice of his deciſion the firſt opportunity.

(*a*) Mr. Juſtice *Aſhurſt* and Mr. Juſtice *Buller*.

tice of the loſs, they do not elect to abandon, they adopt the acts of ſuch perſon, and make him their agent. This is ſomething like the notice that is to be given to the drawer of a bill of exchange, in caſe of non-payment, which if the holder omit to do, he is conſidered as giving credit to the acceptor, and therefore the loſs, if any, muſt fall on him. There may be caſes where the acts of the captain may not make him the agent of either party; and then he only acts in common for them both, till notice is received by the parties at home. If, after ſuch notice, he is continued in the agency, he becomes the agent of the party by whom he is ſo confirmed: But he cannot be conſidered as the agent of the underwriters, till notice has been given to them, and they have had an opportunity of exerciſing their diſcretion, whether they will or will not continue him; though, till notice of the loſs was firſt received by the inſured, the property continued at the riſk of the underwriters. Here, *Cruden* for near three years was conſidered by the inſured as their agent; credit was given to him in that character; frequent applications were made to him for payment; and, till his inſolvency, there was no appearance of any intention to diſown him: That was the firſt moment when the inſured thought of abandoning.—Mr. Juſtice *Buller* ſaid;—"It is true that the inſured are not *bound* to abandon: On the contrary, all the caſes have ſaid that where they are entitled to abandon, they have the option to do ſo or not; but unleſs they do elect to abandon, it is only an average loſs.—The only point to be conſidered is, whether this doctrine will be productive of any uncertainty: If it would, that would be a ſufficient reaſon, in a new caſe, for not adopting it. But, in my opinion, a contrary deciſion would be productive of infinite uncertainty; for it would leave open a very vague queſtion, namely, what time the inſured ſhould be allowed to abandon. If it can extend to three years, there is no reaſon why it ſhould not extend to a much longer period: But no uncertainty can follow from this determination; for our opinion is, that when the account of a loſs has reached the inſured, they muſt make their election

If he neglect this, he adopts the acts of the agent.

If the captain be continued in the management after ſuch notice to the underwriters, he becomes their agent.

election whether they will abandon or not: If they do, they muſt give notice of their intention, to the underwriters, within a reaſonable time. If they act otherwiſe, they cannot be permitted, at any ſubſequent period to change a partial into a total loſs."

In the following caſe the above principles were adopted and enforced by Lord *Kenyon*; and, indeed, they have ever ſince been received and acted upon as clear law.

A recaptured ſhip is carried into a diſtant port, and there ſold for the benefit of all concerned, and the inſured give directions to the agent to have the proceeds remitted to them, but afterwards, and four months after they had notice of the loſs, they give notice of abandonment.—This is too late.

Allwood v. *Henkell*, at N. P. B. R. after Mich. 1795. *Park* 172.

Goods were inſured, "At and from *London* to *Jamaica*." —The ſhip was taken by a *French* privateer within a few leagues of *Jamaica*. Part of the property inſured was taken out of the ſhip. The captain, boatſwain, and all but ſeven men, were alſo taken out of her. In a fortnight after, as the captors were proceeding to *America*, the ſhip, with the remainder of her cargo, was retaken by an *Engliſh* frigate, and ſent into *Antigua*; and both were ſold there under a decree of the vice-admiralty court, by a prize agent, who received the proceeds to be paid over to the concerned, deducting one eighth for ſalvage, according to the late prize act. (*a*) The capture and recapture were entered at *Lloyd*'s on the 15th of *February* 1795; but it was not known whither the ſhip was carried till the 30th of *March*, when a letter was received at *Lloyd*'s, addreſſed to the owners, freighters, and underwriters, from the judge of the vice-admiralty court at *Antigua*, informing them of the arrival of the ſhip, and of the ſale of the ſhip and cargo, under a decree of the court; and deſiring to have ſome agent appointed to remit the proceeds to *England*. Powers of attorney were ſent out in *April* by the inſured, for this purpoſe; with orders to remit the proceeds to the banking-houſe of *Smith*, *Payne* and *Smith*, one of whom was agent to the inſured. —It was objected on the part of the defendant, that although the inſured as well as the *inſurers* were informed of the loſs in the beginning of *April*; yet the inſured did not abandon till *Auguſt*, near four months after the power of attorney had been ſent out to *Antigua*. To this it was anſwered that, the property having been abſolutely ſold,

(*a*) 33 *G.* III. c. 66.

ſold, and converted into money, before the inſured knew where the ſhip was taken to; the loſs was total in its nature, and therefore there was no occaſion to abandon.—Lord *Kenyon*, who tried the cauſe, inclined to think that an abandonment was neceſſary, and that the caſe was the ſame as if the property had not been ſold, but remained in *ſpecie* at *Antigua*. But he gave no decided opinion on this point. He ſaid the inſured were not bound to abandon in any caſe; and might, in caſe the ſales had been very advantageous, have taken the benefit of them, in the ſame manner as they might have returned the property, if it had remained in ſpecie. But the inſured muſt make his election ſpeedily, whether he will abandon or not, and put the underwriter in a ſituation to do what is neceſſary for the preſervation of the property, whether ſold or unſold: "He cannot," ſaid his lordſhip, "lie by, and treat the loſs as an average loſs, and take meaſures for the recovery of it, without communicating that fact to the underwriters, and letting them know that the property is abandoned to them." —There was a verdict for the plaintiff only for an average loſs.

The inſured muſt make his election ſpeedily.

He cannot treat the loſs as a partial loſs, and then abandon.

So, if a ſhip be inſured for part of her value, and being captured, the inſured demand as for a total loſs, which the underwriters are willing to pay, on having an aſſignment of *one fourth* part of the ſhip from the owner, by way of abandonment; but the inſured refuſe this, becauſe the one fourth of the ſhip is of greater value than the ſum inſured; and the inſured inſtead of abandoning, repurchaſe the ſhip from the enemy:—In this caſe, he is not entitled to recover as for a total loſs, not having abandoned; nor can he recover the ſum paid for the repurchaſe of the ſhip, that being an illegal contract, and not only a trading with the enemy, but alſo a ranſom, within the meaning of the ranſom acts. This will be found determined in the following caſe.

If the underwriters demand an abandonment of more than they have inſured, this need not prevent the inſured from abandoning to the amount of the ſum inſured: But if he neglect this, he ſhall not afterwards recover as for a total loſs.

The ſhip *Themis* was inſured for twelve months, and ſailed on the 4th of *April* 1797, on a voyage from *Shields* to *Riga*; was captured on the 7th of *April* by a *French* privateer,

A *Britiſh* ſhip is captured, & carried into a neutral port, & there condemned by the enemy's conſul; If the inſured

do not abandon, but repurchaſe the ſhip ſold under the ſentence, he ſhall not recover as for a total loſs; the property never having been out of him by the condemnation; nor ſhall he recover the ſum paid for the repurchaſe, that being a ranſom, and illegal.

Havelock v. *Rockwood*, 8 T. R. 268. Vid. ſup. 289.

privateer, and carried into *Bergen* in *Norway*, where, on the 17th of *April*, ſhe was condemned by a ſentence of the *French Conſul* there.—News of this being brought to *England* by the captain, the plaintiff demanded a total loſs from the underwriters, on which he received a letter from their broker, informing him that they were ready to ſettle with him, he firſt making an aſſignment of *one fourth* part of the ſhip to the broker for their benefit; and that, if the plaintiff had any thoughts of repurchaſing the ſhip, the underwriters would have no objection to pay their *quota* of the price.—The ſum inſured not amounting to one fourth of the value of the ſhip, the plaintiff declined making the aſſignment.—There were frequent inſtances of this ſort of condemnation in the port of *Bergen* during this war, which were made with the knowledge of the *Daniſh* government, who received duties thereon, and on the ſales in conſequence of them. On the 13th of *July* 1798, the ſhip was ſold by public auction, by the officer appointed by the court of *Denmark* for ſuch ſales, and was purchaſed for the plaintiff, by his agent at *Bergen*, for the ſum of 1628 l. 8 s. 4d., which was her fair value. The ſhip, being then repaired, inſtead of proceeding to *Riga*, ſailed to *Peterſburgh*, and afterwards returned to *England*.—In an action upon this policy, the defendant paid 30 l. 11 s. 3 d. *per cent.* into court, and upon the trial there was a verdict for the plaintiff as for a *total loſs*, ſubject to the opinion of the court on a caſe which ſtated the above facts.—The queſtions for the opinion of the court were, 1ſt, Whether the plaintiff was entitled to recover as for a total loſs, or only for a partial loſs. 2dly, If for a partial loſs only, then, whether the ſum paid for the purchaſe was to be included, in which caſe a nonſuit was to be entered.—It was contended on the part of the plaintiff, that he was entitled to recover as for a total loſs, on the ground that the ſhip was captured by an enemy, and condemned by a court of competent juriſdiction: But the court expreſſing a decided opinion that no *French* court of admiralty could legally be holden in *Denmark*, adopting the deciſion in

in our court of admiralty, reſpecting the ſhip *Flad Oyen*,(*a*) that point was abandoned as untenable.—It was then inſiſted, 1ſt. That when the ſhip was captured, the plaintiff had a right to abandon, and did in fact abandon; and 2dly. That at leaſt the plaintiff was entitled to recover as for a partial loſs, in which was to be included the ſum paid for the repurchaſe of the ſhip.—On the part of the defendant it was anſwered, 1ſt. That whatever right the inſured might have had to abandon at one time, he ought to have made his election to do ſo, immediately after the capture; but he refuſed to transfer his right to the inſurer, and therefore he could not ſay that he was ready to abandon; 2dly. That if this was only a partial loſs, the price paid for the repurchaſe of the ſhip ought not to be included in it, that being a void contract, not only by the ranſom acts, 2 *G.* III. c. 25, and 35 *G.* III. c. 66, § 37, 38, 39, but alſo by the common law, on the ground of its being a trading with the enemy.—The court determined that the plaintiff was not entitled to recover on either of the grounds upon which he attempted to ſupport his caſe.—They declined giving any opinion on the queſtion, whether the contract at *Bergen* was void, on the ground of its being a *trading with the enemy*, as that queſtion would ſhortly come before the court upon a writ of error, in the caſe of *Potts* v. *Bell*. (*b*) The only queſtion then remaining was that relative to the ranſom. Upon this, they were clearly of opinion, that the tranſaction above ſtated amounted to a ranſom; that the money paid by the plaintiff to regain the poſſeſſion of his ſhip was illegally paid; and conſequently that it could not conſtitute a charge on the underwriter.

But if, by any interference of the underwriters, the inſured be actually prevented from abandoning, the underwriters

But if the inſurers in any manner prevent the abandonment, they ſhall pay the whole loſs, to the amount of the ſum inſured.

(*a*) Vid. ſup. 289.—(*b*) In that caſe it has ſince been determined, upon great conſideration, that any trading by a *Britiſh* ſubject with the enemy, without the King's licenſe, is illegal, and that a policy on goods bought from the enemy is void.—Vid. ſup. 73.

derwriters are liable for all the loſs ſuſtained by the inſured to the extent of the ſum inſured.

A total loſs having happened, the inſured propoſes to abandon, but is diſſuaded from it by the underwriters, who order the ſhip to be repaired, but afterwards refuſe to pay for the repairs, and the ſhip is, on this account, obliged to be ſold: The inſurers are liable for all the loſs ſuſtained, to the amount of the ſum inſured.

As, where a ſhip was inſured "from *Leghorn* to *London*, with liberty to touch at *Nice*. The ſhip met with an accident in the courſe of her voyage, and was obliged to put into *Nice* to repair. Advice of this was tranſmitted to the owner, and they were informed that it would be neceſſary to unload, by which a conſiderable expenſe muſt be incurred. This he communicated to the underwriters, and expreſſed a deſire to abandon. Some altercation aroſe; they inſiſting on the veſſel's being repaired, and telling him to pay the bills. He at laſt conſented to this; but refuſed to advance any money; in conſequence of which it became neceſſary to take up a large ſum of money on bottomry. The ſhip was refitted and reſumed her voyage, and gained freight afterwards. Upon her arrival at *London*, application was made to the underwriters to take up the bottomry bond, which they refuſed, and the veſſel was obliged to be ſold, to ſatisfy that debt, ſo that ſhe never was in the poſſeſſion of the inſured again. There was due upon the bottomry bond 678 l., and the ſhip ſold for 630 l.—Under theſe circumſtances, Mr. Juſtice *Buller*, who tried the cauſe, was of opinion, and it was ſo agreed at the trial and not afterwards diſputed, that there had not been a total loſs at *Nice*; for though the plaintiff offered, and was entitled to abandon, yet, in truth, he had not abandoned. This therefore was conſidered only as an average loſs.—But Mr. Juſtice *Buller*, at the trial, and the court afterwards, determined, that the underwriters were anſwerable for all the injury that had accrued to the owner in conſequence of their interference, and directions, and their ſubſequent refuſal to diſcharge the bottomry bond: That, in conſequence of this, the ſhip never came free to the owner's hands, but was obliged to be ſold, and therefore the underwriters were liable to the amount of the inſurance.

Da Coſta v. *Newnham*, 2 T. R. 407.

If the ſhip be not heard of in a reaſonable time,

In a former chapter it was ſhewn that if no intelligence be received of a ſhip within a reaſonable time,

it

it ſhall be preſumed that ſhe foundered at ſea. (*a*) When the time has elapſed which affords that preſumption, the inſured may abandon, and claim as for a total loſs.

the inſured may abandon.

Sect. 3.

Of the Form of the Abandonment.

IN the preceding ſection we have ſeen that, as ſoon as the inſured is informed of a total loſs, he muſt make his election whether he will abandon or not. If he determine to abandon, and demand as for a total loſs, he is not obliged, as in ſome foreign countries, to make a formal proteſt, (*b*) but merely to give notice of the loſs to the underwriters, and of his determination to abandon.

Notice of abandonment.

It is ſingular, however, that an abandonment is not made in any particular form, or accompanied by any of thoſe ſolemnities which ſuch an important act would ſeem to require. But in whatever form an abandonment is declared, it muſt be explicit, and is not to be taken as matter of inference from an equivocal act.

There is no particular form of an abandonment. But it muſt be explicit.

Therefore, where a letter from the inſured, ſtating that the ſhip had been forced on ſhore, and a quantity of ſugars damaged, was ſhewn by the broker to the underwriters; and they, by way of anſwer, deſired, "that the inſured would do the beſt they could with the injured property;" —in an action on the policy, it was inſiſted that this letter amounted to an abandonment, and that the anſwer of the underwriters was an aſſent to it.—But Lord *Kenyon*, who tried the cauſe, ſaid, that as this was but a partial loſs, the inſured could not, by their own act, turn it into a total one. That it was the intereſt of the underwriters, and the duty of the inſured, to make a partial loſs as light

The inſured informs the underwriters that the ſhip has been ſtranded, and the goods damaged, and the underwriters deſire the inſured to do the beſt they can with the goods; this will not turn a partial into a total loſs.

Thelluſon v. *Fletcher*, Eſp. Rep. 72, ſup. 105.

(*a*) Vid. ſup. ch. 13, § 1. p. 416. *Emerig.* tom. 2, p. 181.—
(*b*) Vid. *Pothier*, h. t. n. 126. *Emerig.* tom. 2, p. 190.

light as poſſible; and that this was the meaning and import of the letter, and of the anſwer of the underwriters.

There muſt be ſome notice, if the inſured means to abandon.

This notice of abandonment may be given, either to the underwriter himſelf, or to the agent who has ſubſcribed for him. And this is neceſſary though the ſhip and cargo were ſold and converted into money before the notice of the loſs was received. (*a*)

If the inſurance be entire, the inſured cannot abandon for part only.

In general, the abandonment ought to be made for the whole of the effects inſured, and not for a particular part; as if part be rotten, the inſured cannot abandon that part only and retain the reſt, but he muſt abandon the whole or nothing; for the contract being entire, cannot be ſevered. (*b*)

Thus, if I have divers ſorts of goods on board a *ſhip*; as ſugars, indigo, and cotton; and I inſure 1000 l. on the whole, without any diſtinction; this inſurance is entire, and I cannot abandon my ſugars, and retain my indigo and cotton. (*c*)

But if different articles be ſeparately inſured or ſeparately valued, any one of them may be abandoned.

But if I inſure theſe articles by different policies; or if, in the ſame policy, they be ſeparately valued; I may abandon any one article and retain the reſt; becauſe theſe are, in effect, diſtinct inſurances, though in the ſame policy. (*d*)

So, if an inſurance be made on a ſhip and cargo diſtinguiſhing how much for the one, and how much for the other; and the ſhip in the courſe of the voyage be condemned as incapable of proceeding further; the inſured may abandon for the ſhip, and not for the cargo. (*e*) But if I inſure the ſhip and cargo *for one entire ſum*, and the ſhip be ſtranded, I cannot retain the goods, and abandon the ſhip. (*f*)

The abandonment muſt be unconditional.

It muſt be ſimple and unconditional; otherwiſe it will not transfer the entire property to the inſurers, which is

(*a*) *Hodgſon* v. *Blackiſton*, at N. P. after Hil. 38 *G.* III. *Park* 172.—(*b*) Vid. *Valin* on art. 47, h. t. p. 102.—(*c*) *Valin* ubi ſup. *Pothier*, h. t. n. 131.—(*d*) *Valin* ut ſup. *Pothier*, n. 132.—(*e*) *Emerig.* tom. 2, p. 215.—(*f*) *Emerig.* tom. 2, p. 215.

is of the eſſence of the abandonment. If therefore I abandon a captured ſhip, on condition that in caſe ſhe ſhall be releaſed, ſhe ſhall continue my property, and I ſhall repay with intereſt the ſum which the inſurers ſhall have paid me, ſuch an abandonment would be void. (*a*)

Sect. 4.

Of the Effect of an Abandonment.

The abandonment tranſfers the property ſaved to the inſurers in proportion to their reſpective ſubſcriptions.

BY the abandonment the inſured, as we have already obſerved, yields up to the inſurers, all his right, title and intereſt in the ſhip or goods inſured, or what may be ſaved of them, which, from the notice of abandonment, become the property of the inſurers. (*b*) It operates as a tranſfer to them, in proportion to their reſpective ſubſcriptions, without any regard to the priority of the policies, if more than one; (*c*) and though the ſhip or goods ſhould appear, by the ſeveral policies, to be over-inſured. (*d*) And this tranſfer has a ſort of retroſpective relation in reference to the inſurers, who, to the extent of the ſum inſured, are preſumed to have been, from the beginning, owners of the things inſured. (*e*) *Quod repudiatur, retrò noſtrum non fuiſſe palam eſt.* (*f*)

And it relates back to the commencement of the voyage.

In *France* the abandonment of the ſhip tranſfers the freight ſhe has earned.

This principle is carried ſo far by the *French* law, that, by the abandonment of a ſhip the inſurer becomes entitled to all the freight ſhe may have earned, freight being deemed an incident inſeparable from the ſhip. *Emerigon* even goes the length of ſaying that it is inconſiſtent with the nature of the contract of inſurance, that the owner ſhould claim the freight of a ſhip, the value of which he has received from the inſurer upon the abandonment. And

(*a*) *Valin*, art. 60, p. 133, art. 47, p. 103. *Emerig.* tom. 2, p. 194.—(*b*) Vid. *Le Guidon*, ch. 7, art. 1.—(*c*) *Emerig.* tom. 2, p. 194.—(*d*) Vid. ſup. ch. 4, § 4, p. 115.—(*e*) *Emerig.* tom. 2, p. 196.—(*f*) ff. Si quid in fraudem, 1.

And he ſupports this opinion upon the ground, that in the courſe of the voyage the value of the ſhip muſt neceſſarily diminiſh in nearly the ſame proportion as the freight increaſes; and conſequently, that the value of the ſhip and freight at any given time in the voyage is only equal to the original value of the ſhip at the commencement of the voyage. (*a*) But this notion could only have originated in the abſurd ſuppoſition that a ſhip can earn no more freight in any voyage, than is ſufficient to reinſtate her in the ſame ſituation ſhe was in when ſhe ſailed on the voyage.

In *England* freight is inſurable ſeparately from the ſhip.

With us, however, freight is a matter inſurable, as we have already ſeen, ſeparately from the ſhip, (*b*) and the abandonment of the ſhip does not transfer to the inſurer the freight ſhe has earned.

Where the inſurance is for leſs than the value of the thing inſured, the abandonment is in the ſame proportion.

But where the intereſt of the inſured is not entirely covered by the inſurance, he may abandon to the extent of the ſum inſured; for he is his own inſurer for the reſidue.—Thus, if goods of the value of 5000 l. be inſured only to the amount of 4000 l., and a total loſs happen, the inſured ſhall only abandon four-fifths of what is ſaved; the remaining fifth will belong to himſelf; (*c*) and he will be tenant in common, for that fifth with the inſurers.—The ſame rule holds where the cargo, by a new purchaſe during the voyage, is augmented in quantity.

If goods be partly inſured, and money borrowed on reſpondentia for the reſidue; the inſurer will have the legal title to what is abandoned, and the lender an *equitable claim* for his proportion.

So, where goods are only partly inſured, and the owner has borrowed money on reſpondentia to the value of the reſidue; if he abandon, the inſurer and the lender have a joint claim to what is ſaved, in proportion to their reſpective intereſts. But by the abandonment, the inſurer is put in the place of the inſured, and has the *legal title* to the effects ſaved, and the lender only an *equitable claim* to his proportion. (*d*)

In *France* the claim of the lender is preferred to that of the inſurer.

Yet, by the law of *France*, (*e*) the claim of the lender, in ſuch caſe, ſhall be preferred to that of the inſurer, to

(*a*) Vid. *Emerig.* t. 2, p. 221.—(*b*) Vid. ſup. ch. 3, § 4.—(*c*) *Emerig.* tom. 2, p. 215, 237. *Valin*, ſur. art. 47, h. t. p. 106.—(*d*) Vid. *Emerig.* t. 2, p. 234.—(*e*) Ord. mar. tit. *contrats à la groſſe*, art. 18.

to the extent of his capital.—The reaſon of this preference is, that the lender contributes directly to the procuring of the goods; whereas the inſurer is only a ſurety to protect the adventurer from the riſk, without furniſhing the thing put in riſk. The lender has a ſubſtantial intereſt in the goods, and being in nature of a pawnee, has a ſort of *lien* on them, which cannot be diſcharged by the transfer which the abandonment operates to the inſurer. This only puts the inſurer in the place of the inſured; but the creditor and debtor can never have concurrent rights. (*a*) *Emerigon* even goes ſo far as to ſay that the lender's claim ought to be preferred, even for the marine intereſt.—*Valin* (*b*) holds a contrary opinion, and argues to refute this reaſoning of *Emerigon*, which was contained in a letter which he had received from *Emerigon* on this ſubject. *Emerigon*, however, in his book, ſupports his former opinion, and triumphs in this opinion being ſanctioned by that of *Pothier*. (*c*)

If there be three inſurances; one on the *ſhip and cargo*; one on the ſhip only; and one on the cargo only; *Emerigon* (*d*) thinks that inſurers on the ſhip and cargo have an equal claim on the effects ſaved, with the inſurers on the cargo only, and that they have a like claim on the freight, and the remains of the ſhip, with the inſurers on the *ſhip only*, in proportion to their reſpective ſubſcriptions.—For example: If a ſhip be valued at 5000 l., the cargo 5000 l., total 10,000 l.; and theſe are inſured by different policies, thus;

If there be three policies, one on the ſhip and cargo, one on the ſhip only, & one on the cargo only; how, in caſe of abandonment, the claims of the different ſets of inſurers upon the produce of the ſhip and goods abandoned ſhall be adjuſted.

	£.
On ſhip and cargo	3000
On the ſhip only	3000
On the cargo only	3000
Uninſured	1000
	10,000

A ſhipwreck

(*a*) *Emerig.* tom. 2, p. 234, 235.—(*b*) *Valin*, tit. *contrats à la groſſe*, art. 18.—(*c*) *Pothier*, *contrats à la groſſe*, n. 49.—(*d*) Tom. 2, p. 240.

A ſhipwreck happens, and the net proceeds of the wreck of the ſhip are 500 l., and of the cargo 500 l.; total 1000 l. *Emerigon* would adjuſt the claims of all parties thus:

	£.
To the owners for their part of ſhip and cargo uninſured, - - - - - -	100
To the inſurers on ſhip and cargo, a moiety of the produce of the wreck, - - -	225
The like to the inſurers on the ſhip, - -	225
To the inſurers on the cargo, a moiety of the produce of the goods ſaved, - -	225
The like to the inſurers on the ſhip and cargo,	225
	1000

By this adjuſtment the inſurers on the ſhip and cargo would have a double ſhare of the effects abandoned, which is manifeſtly unjuſt.—An *Engliſh* merchant would, I conceive, adjuſt the different claims thus:

	£.
To the owners for their part of ſhip and cargo uninſured, - - - - - -	100
To the inſurers on ſhip and cargo, a moiety of three-fifths of the produce of the wreck, -	150
To the inſurers on the ſhip, three fifths of the produce of the wreck, - - -	300
To the inſurers on the cargo, three fifths of the produce of the goods ſaved, - -	300
To the inſurers on the ſhip and cargo, a moiety of three-fifths of the produce of the goods ſaved, - - - - -	150
	1000

If, after the loſs is paid, compenſation be made to the owner, this ſhall go to the inſurer.

The abandonment does not only entitle the underwriters to all that can be ſaved of the effects inſured; but if compenſation be made to the inſured for the injury from which the loſs aroſe, this compenſation ſhall go to the underwriters; for when they have paid the loſs,

loſs, they, and not the inſured, are the real ſufferers.—This will appear by the following caſe.

The King granted letters of repriſal againſt the *Spaniards*, for the benefit of his ſubjects, in conſideration of the loſſes they had ſuſtained by unjuſt captures. The commiſſioners appointed to diſtribute the produce of theſe repriſals among the ſufferers, would not permit the *inſurers*, but the *owners* only, to make claim to the parts of the prizes allotted to the ſufferers, although the owners were already ſatisfied for their loſs by the inſurers, who thereupon brought their bill in *Chancery*.—Lord *Hardwicke*, C. decreed in favour of the inſurers.—He ſaid;—"The perſon originally ſuſtaining the loſs was the owner; but, after ſatisfaction made to him, the *inſurer*. No doubt but, from that time, as to the goods themſelves, if reſtored *in ſpecie*, or compenſation made for them, the inſured ſtood as a truſtee for the inſurer, in proportion to what he paid; although the commiſſioners did right to avoid being entangled in accounts, and in adjuſting the proportion between them. Their commiſſion was limited in time; they ſaw who was owner; nor was it material to them to whom he aſſigned his intereſt, as it was in effect after ſatisfaction made."

Repriſals were made on the *Spaniards* to indemnify the ſufferers by unjuſt captures: The inſurers, who have paid the owners the loſſes ſuſtained by thoſe captures, ſhall ſtand in their place, and receive their proportion.

Randal v. *Cockran*, in Chan. 1748. 1 *Vez.* 98.

If, upon a total loſs happening, the ſhip be abandoned, but ſhe afterwards arrive ſafe; this ſhall not avoid the abandonment. On the one hand, the inſurers ſhall take to their own uſe all the profit of the voyage; and the inſured is entitled to nothing, except for ſo much as he was uninſured. (*a*) On the other, they ſhall not, on account of the ſafe arrival of the ſhip, refuſe to pay the ſum inſured.—As if, upon a capture, the inſured abandon, and the ſhip be afterwards releaſed, or otherwiſe recover her liberty; the inſurers ſhall nevertheleſs ſatisfy the inſured as for a total loſs: But then they are entitled to all the benefit of the voyage. (*b*)

If the ſhip, after abandonment, arrive ſafe, the inſurer ſhall have all the profit of the voyage.

So,

(*a*) *Le Guidon*, ch. 7, art. 12.—(*b*) *Emerig.* tom 2, p. 197.

But they cannot compel the insured to take back the thing insured, and refund the money.

So, if the ship or goods insured happen to be recovered undamaged, after the insurer has paid a total loss; the following case will shew that he cannot compel the insured to refund the money, and take back the ship or goods; but the insurer shall stand in his place, and shall have the benefit of salvage.

A total loss is paid on a quantity of bullion, which is afterwards recovered by the insured: The insurer cannot recover back more than his proportion of the value of it, after deducting the expense of salvage.

De Costa v. *Frith*, 4 *Bur.* 1966, sup. 108.

An insurance was made, "Upon any of the packet-"boats that should sail from *Lisbon* to *Falmouth*, for one "year, upon any kind of goods; such goods to be valued "at the sum insured on the packet-boat, without further "proof of interest than the policy; and to make no return "of premium for want of interest, being on bullion or "goods."—The defendant, who was one of the insured, had an interest in bullion on board the *Hanover* packet, on a voyage from *Lisbon* to *Falmouth*. The ship was totally lost off *Falmouth*; and the loss was adjusted at 100 l. *per cent.* but by a memorandum on the policy, the insured agreed that,—"*Should any salvage* thereafter be recovered, he "would refund to the insurers, *whatever he might so recover*, "in such proportion as the sum insured bore to the whole "interest;" and the insurer accordingly paid the whole sum insured.—An iron trunk, which contained all the bullion, was afterwards fished up, and the bullion recovered without any loss or prejudice whatever, and delivered to the insurer. The expense of salvage amounted to 63 l. 8s. 2d. —The insurer, upon this, brought an action against the insured for money had and received, to recover back the amount of his subscription. The defendant (the insured) paid into court 48 l. 4s., being the plaintiff's proportion of the value of the bullion recovered, after deducting the expense of salvage.—On the part of the plaintiff (the insurer) it was contended that by the recovery of the bullion, the contract was performed on the part of the insurers, and that the loss could only be considered as a partial loss, viz. the amount of the salvage; and that the agreement to allow the insurer in the proportion of the sum insured to the whole interest, made no difference. —But the court were unanimously of opinion that the insurer

insurer was not entitled to recover back the money he had paid to the insured, but only his proportion of the value of the goods saved, after deducting the expense of salvage, which was the sum paid into court.

An abandonment once properly made is irrevocable.

An abandonment once properly made, upon a sufficient ground, and accepted by the insurers, is absolute and binding upon both parties; nor can it be revoked but by mutual consent. (*a*) *Emerigon* says, that if a ship, by reason of sea-damage, be condemned as incapable of proceeding on her voyage, and the insured abandon; but the ship, being refitted, is brought home at the expense of the insurers; the insurers cannot compel the insured to take her back, but must pay the total loss. (*b*)—*Valin* holds a contrary opinion, and says, that if the insurers have not voluntarily paid the sum insured, they may, in such case, oblige the insured to take back the ship; the only question between them being, as to the amount of the partial loss. (*c*) The opinion of *Emerigon* seems to be founded on the best reasoning.

But if it be not upon a sufficient ground, it will be void.

But the abandonment is irrevocable only where it is made upon a sufficient ground: And, therefore, if it appear to have been made upon a partial, and not a total loss; or upon information that proves false or unfounded, it will be void *ipso jure*. *Nam recte revocari, rescindi, et retrahi dicitur, quod ipso jure nullum est. (d)*

(*a*) *Pothier*, h. t. n. 138. *Emerig.* tom. 2, p. 197.—(*b*) *Emerig.* tom. 2, p. 195.—(*c*) *Valin*, on art. 60, h. t. p. 544.—(*d*) Vid. *Emerig.* tom. 2, p. 197.

Sect.

Sect. 5.

Of the ordering and diſpoſal of the Effects abandoned.

In caſe of misfortune, the inſured is bound to uſe his endeavours to ſave as much as poſſible.

IN caſe of ſhipwreck or other misfortune, the effects that are ſaved continue, till abandonment, the property of the inſured, who is bound in juſtice, honour, and conſcience, to uſe his utmoſt endeavours to make the moſt of what may be reſcued from deſtruction; in order, as much as poſſible, to lighten the burthen of the inſurers. To enable him to do this, without prejudice to his right of abandonment, our policies provide that, in caſe of any loſs or misfortune to the inſured, their factors, ſervants, and aſſigns, ſhall be at liberty to ſue, and labour about the defence, ſafeguard and recovery of the goods and merchandizes and ſhip, &c. without prejudice to the inſurance; *to the charges whereof, the inſurers agree to contribute, each according to the rate and quantity of his ſubſcription.* The meaning of this clauſe is, that, till the inſured has been informed of what has happened, no act of the captain ſhall prejudice their right to abandon. (*a*) There is a ſimilar proviſion in the policies of all other commercial countries, with a ſimilar undertaking on the part of the underwriters, to defray all expenſes, without limit, except in the policy uſed at *Marſeilles*, in which the inſurers only undertake to defray all expenſes occaſioned by the ſalvage, *provided they do not exceed the value of the effects ſaved*; a precaution, as *Emerigon* obſerves, which prevents their being ever liable for more than the ſum inſured. (*b*) This accords with the ſentiments of *Cleirac*, who ſays that the expenſes of the recovery

(*a*) Per *Aſhurſt*, J. in *Mitchell* v. *Edie*, ſup. 509.—(*b*) Vid. *Emerig.* tom. 2, p. 205.

recovery of the effects ſaved, ought not to increaſe the loſs beyond the ſum inſured. (*a*) But this reſtriction has occaſioned many inconveniences both to the inſured and inſurers, (*b*) which is the reaſon, perhaps, why it has not been adopted in any other place that I know of.

Duty of the captain in the care of what may be ſaved.

As to the captain, the ſhip and cargo being confided to his care, it is peculiarly his duty, in order that he may ſhew himſelf worthy of ſo great a truſt, to employ all his courage, ſkill, and induſtry, in the protection and preſervation of the one and the other.

His power.

From the nature of his ſituation, he has an implied authority, not only from the inſured, but alſo from the inſurers and all others intereſted in the ſhip or cargo, in caſe of misfortune, to do whatever he thinks moſt conducive to the general intereſt of all concerned; and they are all bound by his acts. (*c*) Therefore, if the ſhip be diſabled by ſtreſs of weather, or any other peril of the ſea, the captain may hire another veſſel for the tranſport of the goods to their port of deſtination, if he think it for the intereſt of all concerned that he ſhould do ſo. Or he may, upon the loſs of the ſhip, inveſt the produce of the goods ſaved in other goods, which he may ſhip for his original port of deſtination; and this, according to the doctrine of Lord *Mansfield* and Mr. Juſtice *Buller*, in the caſe of *Plantamour* v. *Staples*, (*d*) ſhall bind the inſurers. For whatever is recovered of the effects inſured, the captain is accountable to the inſurers. If the inſured neglect to abandon when he has it in his power to do ſo, he adopts the acts of the captain, and he is bound by them. If, on the other hand, the inſurers, after notice of abandonment, ſuffer the captain to continue in the management, he becomes their agent, and they are bound by his acts. (*e*)

As

(*a*) *Cleirac* ſur *Le Guidon*, ch. 20, art. 9.—(*b*) Vid. *Emerig.* tom. 2, p. 205.—(*c*) Per Lord *Mansfield* in *Mills* v. *Fletcher*, ſup. 498.—(*d*) Vid. c. 11, § 2, ſup. 377.—(*e*) Per *Aſhurſt*, J. in *Mitchell* v. *Edie*, ſup. 509.

Duty of the ſailors.

As to the *ſailors*,—when a misfortune happens, they are bound to ſave and preſerve the merchandize to the beſt of their power; and while they are ſo employed, they are entitled to wages, ſo far at leaſt as what is ſaved will allow: But if they refuſe to aſſiſt in this, they ſhall have neither wages nor reward. In this the *Rhodian* law, (*a*) and the laws of *Oleron*, (*b*) of *Wiſbuy*, (*c*) and of the *Hans Towns* (*d*) all agree.

(*a*) Leg. Rhod. art. 3.—(*b*) Art. 3.—(*c*) Art. 15.—(*d*) Art. 44.

CHAP.

CHAP. XV.

Of the Adjuſtment of Loſſes.

Preliminary Obſervations.

THE adjuſtment of a loſs is the ſettling and aſcertaining the amount of the indemnity which the inſured, after all allowances and deductions are made, is entitled to receive under the policy, and the fixing the proportion of this, which each underwriter is liable to pay. To aſcertain with due preciſion the amount of a loſs is ſometimes a work of conſiderable difficulty: And though this is generally performed, without litigation, by perſons converſant with this branch of buſineſs; yet queſtions ſometimes ariſe upon which the moſt experienced merchants cannot agree, and then the law muſt draw the line between them.

By the law of *England*, as it now ſtands, as well as by the general law of merchants, the contract of inſurance ought not to be lucrative to the inſured, nor enable him to make a profit out of the loſs of another. It ought merely to afford him an indemnity, and no more.(*a*) The inſurer ought never to pay leſs, nor the inſured receive more, than that which a fair indemnity demands. And this ſhould be aſcertained, not upon ſubtilties and niceties, but upon plain and eaſy rules, the dictates of common ſenſe, drawn from the truth of the caſe.

In adjuſting a loſs, the firſt thing to be conſidered is, how the *quantity of the damage* for which the underwriters are liable, ſhall be aſcertained. This being known, the next, and generally the moſt difficult, point to be ſettled, is, by what rule this ſhall be *appreciated*. When theſe things are ſatisfactorily aſcertained, the adjuſtment is uſually

(*a*) Vid. *Le Guidon*, ch. 2, art. 12, *Emerig.* tom. 1, p. 259.

uſually endorſed on the policy and ſigned by the underwriters. We will therefore conſider,

1. How this quantity of damage ſhall be aſcertained;
2. How the loſs ſhall be appreciated;
3. The effect of an adjuſtment.

Sect. 1.

How the Quantity of Damage ſhall be aſcertained.

In caſe of a total loſs, where the inſured abandons, how the loſs ſhall be adjuſted.

WHEN a loſs has happened, the inſured ought to inform himſelf whether it be total or partial; and *if*, under all the circumſtances, it appear to be a total loſs, and he decide to abandon, he muſt give notice of this to the underwriters in a reaſonable time, otherwiſe, as we have already ſeen, (*a*) he will wave his right to abandon, and muſt then be content to claim only as for a partial loſs.

If the policy be a valued one, and the loſs total.

When the loſs is admitted to be total, and the policy is a *valued* one, the inſured is entitled to receive the whole ſum inſured, ſubject to ſuch deductions as may have been agreed by the policy to be made in caſe of loſs. For the inſured, by allowing the value to be inſerted in the policy, agrees that it ſhall be taken as there ſtated; and it is the ſame as if he had admitted it at the trial of the cauſe. (*b*)

Difference between an open and a valued policy, as to the adjuſtment of a loſs.

It is only in the caſe of a total loſs that there is any difference between an open and a valued policy. Upon the latter, the value is admitted, and the inſured has only to prove, if the inſurance was on goods, that the goods valued were on board. Upon an open policy, it is not only neceſſary to prove that the goods were on board, but alſo the *value* of them; which value, not exceeding the ſum inſured, is the ſum the inſurers are bound to pay.

But in the caſe of a *partial loſs*, the like inquiry is to be made into the amount of the loſs, whether the policy be of the one ſort or of the other. (*c*) The indemnity ſecured

(*a*) Sup. 509, 510.—(*b*) Vid. ſup. 199.—(*c*) 2 *Bur.* 1171. Vid. ſup. 203.

ſecured by either ſort of policy is, that if the thing inſured do not come ſafe to the port of deſtination, but is leſſened in value by damage received in the voyage, the loſs ſhall be borne by the inſurer.

Rule, where the loſs conſiſts of one entire individual, capable of a ſeveral valuation.

When the loſs conſiſts in the *total loſs* of one entire individual, parcel of the goods inſured, and this is capable of a ſeveral and diſtinct valuation; as if, out of 100 hogſheads of ſugar, ten happen to be loſt, and the reſt arrive ſafe; the inſurer muſt pay the value of the ten. (*a*)

When part of the goods is ſaved.

When a part of the goods inſured is ſaved, and this exceeds the amount of the freight, the practice is to deduct the freight from the ſalvage, and to make up the loſs upon the difference. But where the freight exceeds the ſalvage, then it is a total loſs. (*b*)

Where all the goods are damaged.

But where the goods inſured are damaged in the whole or in part, it becomes neceſſary to aſcertain the *quantity* of ſuch damage, which is done by taking the value of the goods, in their damaged ſtate, from the prime coſt, and the remainder will be the amount of the loſs.

Where ſeveral articles are inſured, and only one put in riſk.

If ſeveral articles be inſured for one entire ſum, but with a diſtinct valuation to each, and only one be put in riſk: If that one be loſt, the inſured ſhall recover ſuch a proportion of the ſum inſured as the value of that article bore to the value of the whole.

Amery v. *Rogers*, Eſp. Rep. 207.

As, where the plaintiff wrote from *St. Kitts* to his agent in *London*, deſiring him to make inſurance on a ſhip and cargo to the amount of 5500 l. valuing the ſhip at 1500 l. Only 600 l. could be effected. No part of the cargo was ever put on board, ſo that in fact the policy attached only on the ſhip.—The ſhip being loſt, and an action brought on the policy, the above rule was contended for on the part of the defendant.—Lord *Kenyon*, who tried the cauſe, ſeemed to be of opinion that, as the whole ſum inſured was leſs than the value of the ſhip, the plaintiff was entitled to the whole.—But the jury having intimated that the rule as laid down by the defendant's counſel was that

(*a*) 2 *Bur.* 1170.—(*b*) Vid. *Boyfield* v. *Brown*, ſup. 507.

that which prevailed in ſuch caſes at *Lloyd*'s coffee-houſe, his Lordſhip aſſented to their giving a verdict for ſuch a proportion of the ſum inſured as the value of the ſhip bore to the value of both ſhip and cargo.

When there is a clauſe to be free of average under ſo much *per cent.* how that proportion ſhall be aſcertained.

If there be a clauſe in the policy, to be free of average from a particular riſk, under ſo much *per cent.* and a loſs occaſioned by that riſk takes place; the proportion which the loſs bears to the cargo, muſt be calculated upon the cargo which was on board when the loſs happened, not upon that which was on board at any other time.

Rhol. v. *Parr*, *Eſp.* Rep. 444, Sup. 419.

Thus:—In a policy on a ſlave ſhip, there was a memorandum, to be free of average under 5 *per cent.* for loſs by inſurrection of the ſlaves.—An inſurrection took place when there were only 49 ſlaves on board. Seven of theſe were killed.—As this loſs muſt amount to 5 *per cent.* to make the underwriters liable, it became a queſtion, at what time the proportion which the loſs bore to the cargo ſhould be taken;—whether at the time when the inſurrection took place and the loſs happened, or when the whole cargo was on board. Upon examination of perſons acquainted with the practice in ſuch caſes, it was found that the time when the calculation was to be made, was, *when the loſs happened*, at which time the proportion of the loſs to the cargo then on board was to regulate the loſs to be borne by the underwriters.

Sect. 2.

How the Loſs ſhall be appreciated.

THE true price of any thing is that for which things of the like nature and quality are uſually ſold in the place where they are ſituated, if real property; or in the place where they are expoſed to ſale, if perſonal. (*a*)

The firſt price is not always the true value.

The firſt price of a thing does not always afford a ſure criterion to aſcertain its true value. It may have been bought very dear, or very cheap. The circumſtances of time

(*a*) *Pothier, des ventes*, n. 242.

time and place cauſe a continual variation in the price of things. For this reaſon, in caſes of general average, the things ſaved contribute, not according to the prime coſt, but according to the price for which they may be ſold at the time of ſettling the average. *Non quanti emptæ ſunt, ſed quanti veniri poſſunt*, is the rule of the *Rhodian* law. (*a*) The ſame is adopted in the laws of *Wiſbuy*. (*b*)

Averages are ſettled according to the price at the time of ſettling.

Upon the ſubject of the valuation of the goods inſured there has always been a great diverſity of opinion, not only among ſpeculative writers, but alſo among merchants themſelves. Some contending for the prime coſt, others for the current price at the time of the loſs; ſome inſiſting on the price at the time and place where the goods are ſhipped, others on the price at the port of diſcharge. (*c*)

Different modes of appreciating a loſs.

In *France*, where almoſt all policies are valued, the inſured has his election to fix the previous valuation, either at the prime coſt, or at the current price at the time and place of loading. If the goods be of the growth or manufacture of the inſured, the latter valuation is always adopted. (*d*) The ſame rule that applies to goods, applies alſo to the ſhip, which is always valued at the ſum ſhe is worth at the time of her departure, (*e*) or at leaſt at the commencement of the riſk.—If goods, by being brought *from a diſtance*, are augmented in value, they may be eſtimated at their improved value, and an invoice made accordingly; nor ſhall the inſured be obliged to produce his original accounts, having a right to inſure the profit already acquired; and the inſurer muſt either abide by the invoice made by the inſured, or require a valuation by ſkilful perſons according to the *current prices of the time and place*.—It is uſual in *France* to ſtipulate in the policy that the ſhip ſhall remain of the ſame value during the voyage; which is the reaſon why *Valin* (*f*) ſays that where the

How the valuation is made in *France*.

Goods brought from a diſtance may be valued at their improved price.

(*a*) ff. Leg. *Rhod.* l. 2, § 4.—(*b*) Laws of *Wiſb.* art. 20, and 39. Vid. *Santerna*, h. t. par. 3, n. 40. *Roccus*, n. 31.—(*c*) Vid. *Emerig.* tom. 1, p. 261.—(*d*) Vid. Ord. de la mar. h. t. art. 64, and *Valin* on this art. *Emerig.* tom. 1, p. 262.—(*e*) Vid. *Emerig.* tom. 1, p. 263.—(*f*) On art. 8 and 64, p. 56, 136.

the ſhip is abandoned, the *freight*, which augments in the ſame degree as the ſhip is depreciated in value during the voyage, is alſo abandoned, as being an inſeparable incident to the ſhip. (*a*)

In *England* the proper value conſiſts of the prime coſt and all charges.

In *England*, if the policy be an open one, it is an invariable rule to eſtimate a total loſs, not by any ſuppoſed price which the goods might have been deemed worth at the time of the loſs, or for which they might have been ſold, had they reached the market for which they were deſtined; but according to the *prime coſt*; that is, the invoice price, and all duties and expenſes till they are put on board, together with the premium of inſurance. This is the only true, at leaſt the only legal mode of eſtimating a loſs, whether total or partial, on goods; and therefore, whether the goods would have arrived at a good or a bad market is always immaterial. (*b*) Neither is the difference of exchange to be at all regarded in the adjuſtment; for the underwriter does not inſure againſt any loſs ariſing from ſuch cauſes. (*c*)

The value is never affected by the riſe or fall of the market, nor by the courſe of exchange.

It might, with ſome degree of plauſibility, be inſiſted that the prime coſt, after a long voyage, and when the goods inſured had almoſt reached a market where they would have ſold for a great profit, does not amount to an *indemnity*; for, beſide the loſs of the profit the merchant might reaſonably have expected, he alſo loſes all the benefit he could have derived from the uſe of his money in any other adventure. Upon this principle the *Conſolato del mare*, (*d*) in laying down rules for average contributions, declares, that if the goods be loſt before half the voyage is performed, they are to be valued only at prime coſt; but, if after, then at the price at which they might have been ſold at the port of delivery.—However reaſonable this rule may be, abſtractedly conſidered, it would be more than counterbalanced by the litigation it would occaſion, to decide whether the voyage was half performed,

(*a*) Vid. ſup. ch. 14, § 4.—(*b*) Per *Buller* J. at N. P. in *Dick* v. *Allen*, after Mich. 1785, *Park* 104.—(*c*) Per Lord *Kenyon* in *Thelluſſon* v. *Berwick*, at N. P. *Eſp.* Rep. 77.—(*d*) Ch. 95.

formed, or if that were indiſputable, then what was the market price at the port of delivery. But, be this as it may, it is the invariable rule in this country, upon an open policy to eſtimate a total loſs upon goods, by adding to the prime coſt all duties and expenſes and the premium of inſurance; for this has conſtantly been deemed a full indemnity to the inſured.

How a ſhip ſhall be valued.

A ſhip is valued at the ſum ſhe is worth, at the time ſhe ſails on the voyage inſured, including the expenſes of repairs, the value of her furniture, proviſions and ſtores, the money advanced to the ſailors, and, in general, every expenſe of the outfit, to which is added the premium of inſurance. (*a*)

How damage to goods ſhall be eſtimated.

A partial loſs upon either ſhip or goods, is that proportion of the prime coſt, which is equal to the diminution in value occaſioned by the damage. In the following caſe, which aroſe upon a valued policy upon goods, it was determined that the diminution in value, was that proportion of the value, in the policy, which the difference between the price of the ſound, and the price of the damaged, bore to the price of the ſound in the port of delivery.

Sugars *valued* at 30 l. *per* hogſhead are ſo damaged in the voyage, that they are ſold at the port of delivery, for 20 l. 0 s. 8 d. *per* hogſhead, but, if ſound, would have fetched 23 l. 7 s. 8 d.; ſo that the difference was 3 l. 7 s. *per* hogſhead. The loſs in this caſe, is that proportion of 30 l. (the value in the policy) which 3 l. 7 s. (the difference between damaged and ſound at the port of delivery) bears

An inſurance was made upon goods, "At and from "the Iſland of *St. Thomas* to *Hamburgh*, from the load- "ing at that iſland, till the ſhip ſhould arrive and land "the goods at *Hamburgh*."—The goods which conſiſted of ſugars, coffee, and indigo were valued; the clayed ſugars at 30 l. per hogſhead, *Muſcovado* at 20 l.; and the coffee and indigo were alſo valued. Sugars were as uſual, warranted free from average under 5 l. *per cent.* and all other goods under 3 l. *per cent.* unleſs general, or the ſhip ſhould be ſtranded.—In the voyage the ſea-water got in; and when the ſhip arrived at *Hamburgh*, it appeared that every hogſhead of ſugar was damaged; ſo that it became neceſſary to ſell them immediately at *Hamburgh*: And the difference between the price they ſold for, and what they

(*a*) By the ord. de la marine. t. art. 20. the premium cannot be added to the other charges, yet the allowance of it is ſupported by the authority of *Le Guidon*, ch. 2, art. 9, ch. 15, art. 3, 13, 15, and the practice of all commercial nations.

to 23 l. 7 s. 8 d. the price of the ſound at the port of delivery. —The amount of the loſs does not depend on the prices in the market at the port of delivery: But the proportion of the *prime coſt* which the loſs amounts to, may be aſcertained by the prices which the damaged and ſound bear to each other in the port of delivery.

Lewis v. *Rucker*, 2 *Bur.* 1167.

they would have fetched there, had they been ſound, was as 20 l. 0 s. 8 d. per hogſhead, is to 23 l. 7 s. 8 d. That is, they were ſold for 3 l. 7 s. per hogſhead leſs than they would have been worth, had they been ſound.—The defendant paid into court the like proportion of the ſum at which the ſugars were *valued in the policy*, as the price of the damaged bore to that of ſound ſugars at *Hamburgh*. (*a*) —The only queſtion was by what meaſure or rule the damage ought to have been eſtimated.—The plaintiff proved that, at the time of the inſurance, ſugars were worth 35 l. per hogſhead at *Hamburgh*; but that the expectation of a peace had ſuddenly ſunk the price. That the owner of the ſugars, before the ſhip arrived at *Hamburgh*, and before he could know that they were damaged, had ſent orders that they ſhould be houſed there till the price ſhould riſe above 30 l. *per* hogſhead: That, in fact, the negociation not taking place, ſugars did not riſe 25 l. *per cent.* That he might have ſold theſe ſugars at 30 l. per hogſhead, if they could have been kept; and the damage they had received was the only reaſon why they were not kept. The plaintiff, therefore, inſiſted that the neceſſity of an immediate ſale, and the loſs ſuſtained by it, ought to have been taken into the account in computing the damage.—Lord *Mansfield*, who tried the cauſe, left it to the jury to decide, *whether the difference between the*

(*a*) The reporter in this caſe makes Lord *Mansfield* ſtate that the ſum paid into court bore the like proportion to the ſum at which the ſugars were valued in the policy, (30 l.) as the price of the damaged ſugars (20 l. 0 s. 8 d.) bore to the price of the ſound at *Hamburgh* (23 l. 7 s. 8 d.) That is, the ſum ſuppoſed to have been paid into court, was to 30 l. as 20 l. 0 s. 8 d. is to 23 l. 7 s. 8 d. This, by a common operation of arithmetic, would be 25 l. 14 s. per hogſhead, which ſhews that the rule by which the money was paid into court is not correctly ſtated in the report. The ſum paid into court muſt have borne the ſame proportion to 30 l. as 3 l. 7 s. (the difference between the ſound and damaged ſugars at *Hamburgh*) bore to 23 l. 7 s. 8 d. (the price of the ſound there.) This comes to 4 l. 5 s. 11 d. $\frac{1}{2}$ *per* hogſhead, the real amount of the loſs, according to the principles laid down by Lord *Mansfield*, in delivering the opinion of the court.

the ſound and the damaged ſugars, at the port of delivery, ought to be the rule: Or, whether *the loſs occaſioned by an immediate ſale,* ſhould be taken into conſideration. The jury, amongſt whom were many conſiderable merchants, who perfectly underſtood the ſubject, and formed their judgment from their own experience, found the defendant's rule of eſtimation to be right, and gave their verdict for him accordingly.—Upon a motion for a new trial, the court were unanimouſly of opinion that the plaintiffs were not entitled to have the price for which the damaged ſugars were ſold, made up to 30 l. per hogſhead; and that the rule by which the jury had gone was the right meaſure. Lord *Mansfield,* in delivering the opinion of the court, ſaid,—"The rule by which the defendant and the jury have gone is this,—the defendant takes the proportion of the difference between ſound and damaged ſugars in the port of delivery, and pays that proportion upon the value of the goods ſpecified in the policy; and has no regard to the price, *in money,* which either ſound or damaged ſugars bore at the port of delivery. He ſays the proportion of the difference is equally the rule, whether the goods came to a riſing or a falling market. For inſtance; ſuppoſe the prime coſt or value in the policy to be 30 l. and the damaged goods ſell for 40 l.; but, if ſound, would have ſold for 50 l.; the difference is a fifth: The inſurer muſt therefore pay a fifth of 30 l.:—*E converſo,* if they come to a loſing market, and, being damaged, ſell for 10 l.; but, if ſound, would have ſold for 20 l.; the difference is one half: The inſurer muſt therefore pay 15 l.; that is, half the prime coſt or value in the policy. Two objections have been made to this rule: *Firſt,* that it is going by a different meaſure in the caſe of a *partial,* from that which governs in the caſe of a *total,* loſs; for, upon a total loſs, the prime coſt, or value in the policy, muſt be paid.—The anſwer to which objection is, that the diſtinction is founded in the nature of the thing. Inſurance is a contract of indemnity againſt the perils of the voyage, to the amount of the value in the policy; and therefore if the thing be totally loſt, the inſurer muſt pay the

This rule equally holds whether the goods come to a riſing or a falling market.

the whole value which he inſured at the out-ſet. But, where a *part* of the commodity is ſpoiled, no meaſure can be taken from the prime coſt to aſcertain the quantity of the damage ſuſtained. The only way is to aſcertain whether the thing be a third or a fourth worſe than the ſound commodity; and then pay a third or fourth of the prime coſt or value of the goods ſo damaged. (*a*) The *ſecond* objection is, that this being a valued policy, was in nature of a *wager*; and if ſo, there could be no *partial* loſs, and the inſured could only abandon and recover as for a total loſs; becauſe the value ſpecified was fictitious." —In anſwer to this objection, his Lordſhip ſaid,—"To argue that there can be no adjuſtment of a partial loſs upon a valued policy, is directly contrary to the very terms of the policy itſelf. It is expreſsly provided that the article of *ſugar* ſhall be ſubject to *average*, if the loſs exceed 5 *per cent.*; and even if it were not ſubject to average the conſequence would be that every partial loſs muſt thereby become total: But then, the inſured could only recover in the event of a total loſs; and conſequently the plaintiffs in this caſe would not be entitled to recover at all; for there is no colour to ſay that this was a total loſs; beſides, the plaintiffs have taken the goods and ſold them. In oppoſition to the meaſure which the jury have gone by, the plaintiffs contend that they ought to be paid the *whole value in the policy*, upon one of two grounds. 1ſt. That the general rule of eſtimating ſhould have been the difference between the price the damaged goods ſold for, and the prime coſt, or value in the policy. Here the damaged

(*a*) Lord *Mansfield*, in this anſwer to the firſt objection, ſeems, according to the report, to have been labouring to account for the ſuppoſed difference between the meaſure in the caſe of a partial and a total loſs. But with great deference, it would ſeem that the rule to which the objection is made, and which fixes the proportion of the *prime coſt* which muſt be paid in caſe of a partial loſs, is not inconſiſtent with, but is founded upon, the practice of paying the whole of the prime coſt upon a total loſs.

aged goods ſold for 20 l. 0 s. 8 d. per hogſhead; and the underwriters ſhould make it up 30 l.—To this I anſwer, that it would involve the underwriter in the riſe or fall of the market; and, in ſome caſes, ſubject him to pay vaſtly more than the loſs; in others, it would deprive the inſured of any ſatisfaction, though there were a loſs.—For inſtance; ſuppoſe the prime coſt, or value in the policy, 30 l. per hogſhead; the ſugars damaged; the price of the ſound 20 l.; the price of the damaged 19 l. 10 s.: The loſs is about a *fortieth*, and the inſurer would be obliged to pay above a *third*.—Suppoſe they come to a riſing market; the ſound ſugars ſell for 40 l.; the damaged for 35 l.: The loſs is an *eighth*; yet the inſurer would have to pay nothing.—The 2d ground upon which the plaintiffs contended that the 30 l. ſhould be made up, was, that it appeared that the ſugars *would* have ſold for that price, if the damage had not made an immediate ſale neceſſary.—The moment the jury brought in their verdict, I was ſatisfied they had done right in diſregarding the *particular circumſtances* of this caſe; and I was convinced of this, after converſing with perſons of experience in adjuſtments, and after the ſubject had been fully argued at the bar. The nature of the contract is that the goods ſhall come ſafe to the port of delivery; or if not, that the inſurer will indemnify the inſured to the amount of the prime coſt. If they arrive, but leſſened in value by damage received at ſea, the nature of an indemnity ſpeaks demonſtrably, that it muſt be, by putting the inſured in the ſame ſituation, (relation being had to the prime coſt, or value in the policy,) which he would have been in, if the goods had arrived free from damage; that is, by paying ſuch *proportion*, or *aliquot part*, of the *prime coſt*, or value in the policy, as correſponds with the proportion, or aliquot part, of the *diminution in value* occaſioned by the damage. The duty accrues upon the ſhip's arrival and landing her cargo at the port of delivery; and the inſured has then a right to demand ſatisfaction. The adjuſtment can never depend upon future events or ſpeculations:

An inſurer is never to be involved in the riſe or fall of the market.

The indemnity ſecured by the policy is ſuch an aliquot part of the prime coſt as correſponds with the diminution in value occaſioned by the damage.

The duty accrues upon the ſhip's arrival and landing her cargo; and does not depend on future contingencies.

ulations: How long is he to wait; a week, a month, or a year?—In this caſe, the price roſe; but, if peace had been made, the price would have fallen: but the defendant did not inſure that there ſhould be no peace. It is true that the owner acted upon political ſpeculation, and ordered the ſugars to be kept till the price ſhould be 30 l. or upwards: But no private ſcheme or project of trade of the inſured can affect the inſurer: He knew nothing of it: He did not undertake that ſugars ſhould bear a price of 30 l. a hogſhead. If ſpeculative diſtinctions of the merchant, and the ſucceſs of ſuch ſpeculations, were to be regarded, it would introduce the greateſt injuſtice and inconvenience. The inſurer knows nothing of them. Here, the orders were given after the ſigning of the policy. But the deciſive anſwer is, that the underwriter has nothing to do with the price, and that the right of the inſured to a ſatisfaction, where goods are damaged, ariſes immediately upon their being landed at the port of delivery."

No ſpeculation of the inſured can increaſe or diminiſh the amount of the loſs.

In this caſe, which I have abſtracted more fully than uſual, the inſurance was on goods which were valued in the policy, but whoſe real value depended, at the time the inſurance was effected, on a fluctuating market. The goods which were damaged in the voyage, came to a fallen market, where the price was leſs than the value in the policy. The inſured inſiſted on being paid the difference between the price for which the goods were ſold in the port of delivery, and the *value in the policy*. But it was determined that he was only entitled to the proportion of the value in the policy which their diminution in value bore to the price of ſound goods, of the ſame ſort, in the port of delivery; thus uſing the relative prices of the ſound and damaged goods at the port of delivery as the means of aſcertaining the proportion of the *prime coſt* which the inſurer was bound to pay.

Obſervations on the above caſe, and that which follows.

In the following caſe, which came before the court of King's Bench many years afterwards, there was a partial loſs upon a valued policy, but the value in the policy *exceeded the intereſt of the inſured*. There, Lord *Mansfield* and the other judges of the court declared, that it was the conſtant uſage in

If the value in the policy exceed the intereſt of the inſured, the loſs is adjuſted in the ſame manner as if the policy were an open one; and the computation

in ſuch caſes, to adjuſt a partial loſs in the ſame manner as if the policy were an open one; and that the computation muſt therefore be by the *real intereſt* on board, and not by the value in the policy.

muſt be made by the real intereſt on board, not by the value in the policy.

That was an inſurance on a ſhip and goods on board, —"At and from *Omoa* to *London*; valued at the ſum "inſured." There was no value mentioned in the body of the policy, but only the ſums wrote againſt the different names on the back. There were other policies on the ſame ſhip and goods, amounting in the whole to 99,500 l. which exceeded the amount of the intereſt of the inſured. (*a*) The ſhip and a great part of the cargo were loſt, about one tenth only of the goods being ſaved. One queſtion at the trial of this cauſe was, how the loſs, which was conſidered as a partial one, ſhould be adjuſted. (*b*) The broker ſwore that, on ſuch policies as this, where a *total loſs* happened, the whole ſum was paid: But where it was only a partial loſs, they conſidered it as an open policy, and paid a proportion, not of the ſum inſured, but of the value of the goods.—The court of King's Bench, when this came before them, thought it, at firſt, like the caſe of *Lewis* v. *Rucker*. (*c*) But the intereſt of the inſured, in the ſhip and goods, being leſs in value than the ſum inſured, the court held, that this caſe differed from that of *Lewis* v. *Rucker*, and that the conſtant uſage in ſuch caſes was, upon a total loſs, to pay the whole; (*d*) but, upon a partial loſs, to conſider it as an *open policy*. The court were therefore of opinion that the computation in this caſe muſt be by the *real intereſt*

Le Cras v. *Hughes*, B.R.E. 22 G. III. MS.

(*a*) The ſhip and goods inſured had been captured by ſea and land forces jointly. The inſurance was on behalf of the officers and crews of the ſhips; but as the land forces were entitled to a ſhare in this prize, the intereſt of the inſured was therefore leſs than the value of the ſhip and goods, and leſs than the ſum inſured. Vid. ſup. 84, 111.—(*b*) The principal queſtion was, whether the inſured had an inſurable intereſt in the ſhip and goods. For this vid. ſup. 84. where there is a fuller report of this caſe.—(*c*) Sup. 535.—(*d*) Vid. ſup. 199.

intereſt of the inſured on board, and not by the value in the policy.

The true ground of diſtinction between this caſe and that of *Lewis* v. *Rucker* is, that, in that caſe, the value in the policy was conſidered as the *prime coſt*, and this was never diſputed; whereas, in this caſe, it appears that the intereſt of the inſured was conſiderably leſs than the value in the policy.

Sect. 3.

Of the Effect of an Adjuſtment.

An adjuſtment ſigned by the underwriters is *primâ facie* evidence againſt them, and ſufficient of itſelf, if not impeached, to entitle the inſured to recover without any other proof.

AN adjuſtment being indorſed on the policy and ſigned by the underwriters, with a promiſe to pay in a given time, is *primâ facie* evidence againſt them, and amounts to an admiſſion of all the facts neceſſary to be proved by the inſured to entitle him to recover in an action on the policy. It is like a note of hand, and being proved, the inſured has no occaſion to go into proof of any other circumſtance. This was the opinion of Lord C. J. *Lee* in the following caſe.

Hog v. *Gouldney*, at N. P. after Trin. 1745, at G. H. *Beawes* 310.

An inſurance was made on a ſhip "At and from "*Jamaica* to *London*, intereſt or no intereſt, and without "benefit of ſalvage, with a warranty that the ſhip ſhould "ſail with convoy."—The ſhip ſailed with convoy, but was ſo much damaged in the voyage, that ſhe was obliged to bear away for *Charleſton*, where ſhe was condemned and broke up.—All the underwriters, being ſatisfied of the truth of this caſe, paid their loſſes, except the defendant, who went ſo far as to ſettle it, and according to the cuſtom upon ſuch occaſions, indorſed the policy in theſe words;—"Adjuſted the loſs on this policy at "98 l. *per cent.*, which I agree to pay one month after "date. *London*, 5th *July* 1745. *Henry Gouldney*."—When the money became due, he inſiſted on fuller proof, particularly of the ſhip's ſailing with convoy, and her condemnation.—An action was brought on the policy; and Lord C. J. *Lee*, who tried the cauſe, was of opinion that

that this was to be considered as a note of hand, and that the plaintiff had no occasion to enter into the proof of the loss. The jury found a verdict for the plaintiff.—The same rule was followed, the next year, by the same learned judge, in the case of *Hewett* v. *Flexney*. (*a*)

It has been observed that the words used by Lord Chief Justice *Lee*, in this case, were *extremely large*; (*b*) and that the true rule upon the subject might be better collected from two subsequent cases, which will be mentioned hereafter. The words which are supposed to be too large are, "That the memorandum indorsed on "the policy, was to be considered as a note of hand, "and that the plaintiff had no occasion to enter into the "proof of the loss."—It is not easy to discover in what respect the rule here laid down is too large. The memorandum indorsed on the policy, and signed by the defendant, unquestionably amounts to an admission of his subscription to the policy, of the plaintiff's interest in the ship insured, (if the terms of the policy had not rendered that unnecessary,) of her having sailed with convoy, of a loss having happened, and that the amount of that loss was the sum specified in the adjustment, which contains a promise to pay in one month. This, like a note of hand, is *primâ facie* evidence of a debt; and it seems to be as unnecessary for the plaintiff, in an action on the policy, to prove the facts admitted by the adjustment, as to prove the consideration of a note of hand, before it is impeached.—But in neither case is "*the door shut against* "*inquiry*." A note of hand is not *conclusive* evidence of a consideration, though value received be expressed in it. On the contrary, it may be impeached by shewing that it was made upon an unlawful, or corrupt consideration, or without any consideration at all. So, an adjustment, like that which is stated in the foregoing case, may be impeached by shewing that the underwriter was induced to sign it by some fraud or concealment, or by some misconception of the law or fact. But, in either case,

This rule objected to.

The rule vindicated.

The adjustment admits the whole case, and like a note of hand, is *primâ facie* evidence of a debt.

It is not, however, conclusive, but may be impeached by evidence.

(*a*) *Beawes* 308.—(*b*) *Park* 118.

caſe, this muſt be done by *evidence*, and not by *doubts or ſurmiſes* after the time for payment is come; nor can the plaintiff be put under the neceſſity of proving the conſideration of the note in the one caſe, or the facts admitted by the adjuſtment, in the other, until a ſtrong ground of ſuſpicion, at leaſt, be raiſed againſt it by *evidence* on the part of the defendant.

The adjuſtment may be given in evidence in an action on the policy; and the inſured is not obliged to declare eſpecially on it.

It is *primâ facie* evidence againſt the underwriter; but he may impeach it.

In the firſt of the two caſes adduced in ſupport of the objection to the rule, as laid down by Lord C. J. *Lee*, a loſs had been adjuſted at 50 *per cent*, and an action was brought on the policy.—It was contended on the part of the defendant, that the adjuſtment was not binding; but that, if it were, it ought to have been declared on *ſpecially*.—Lord *Kenyon*, who tried the cauſe, was of opinion that it was not neceſſary to declare ſpecially. He ſaid that the adjuſtment was *primâ facie* evidence againſt the defendant: But if there had been any miſconception of the law or fact upon which it had been made, the underwriter was not *abſolutely concluded* by it.—This turned out to be the caſe, and there was a verdict for the defendant.

Rodgers v. *Maylor*, at N. P. after Trin. 1790. *Park* 118.

The doctrine of Lord *Kenyon*, in this caſe, far from ſhaking, or even narrowing the rule, as laid down by Lord C. J. *Lee*, ſeems, on the contrary, to have ſtrongly confirmed it. Lord *Kenyon* ſays, that if there had been any miſconception of the law or fact upon which the adjuſtment had proceeded, the underwriter would not have been *abſolutely concluded* by it. It is plain then, that he conſidered the adjuſtment like a note of hand as *primâ facie* evidence of a debt, but not concluſive, ſince the adjuſtment, like the note of hand, might be impeached by evidence on the part of the defendant.

De Garron v. *Galbraith*, at N. P after Trin. 1795. *Park* 118.

In the ſecond caſe adduced in ſupport of the objection to the rule, as laid down by Lord C. J. *Lee*, it is ſtated that the plaintiff went to trial, having no evidence to produce but the adjuſtment; and the witneſs who proved it, ſwore that, ſoon after they had ſigned it, *doubts aroſe in the minds of the underwriters*, and they refuſed

fuſed to pay, upon which, Lord *Kenyon* ſaid that, under theſe circumſtances, the plaintiff muſt go into other evidence; and not being able to do this, he was nonſuited.—In the following term a motion was made to ſet aſide this nonſuit, upon the ground that an adjuſtment was *primâ facie* evidence of the whole caſe, and threw the *onus probandi* upon the underwriter; and that it amounted to more than proof of the defendant's ſubſcription to the policy.—Lord *Kenyon* ſaid;—"I admit the adjuſtment to be evidence in the cauſe to a certain extent: But I thought at the trial, and ſtill think, that when the ſame witneſs who proved the ſignature of the defendant to the adjuſtment ſaid, that doubts, ſoon after the adjuſtment took place, aroſe in the minds of the underwriters, *as to the honeſty of the tranſaction*, and they called for further proof, the plaintiff ſhould have produced other evidence; and that, ſhutting the door againſt inquiry, after an adjuſtment, would be putting a ſtop to candour and fair dealing amongſt the underwriters.—Accordingly the court refuſed to grant a new trial.

In the account of what paſſed at the trial of this cauſe, it does not appear upon what ſubject the doubts aroſe in the minds of the underwriters, nor at what time the further proof was called for. It would ſeem from the above report that further proof was only called for at the trial by the learned judge who tried the cauſe. It is unfortunate that there is no account of this caſe in the term reports, the ſixth volume of which contains the caſes of the term in which it is ſaid to have come before the court. It is to be preſumed that an accurate ſtatement of the evidence on which the plaintiff was nonſuited, would have clearly ſhewn that the deciſion of the learned judge at *niſi prius*, and afterwards of the court of King's Bench, was correctly right; that juſtice was done; and that, under the particular circumſtances of the caſe, this might have been a very proper exception to the rule, as laid down by Lord C. J. *Lee*. But as the caſe ſtands, in the above report of it, it would be very difficult to reconcile it, even to the deciſion of the ſame learned judge in the above caſe

Whether this caſe can be deemed a ſufficient authority to narrow the rule laid down by Lord C J. *Lee*.

of

of *Rodgers* v. *Maylor*; (*a*) nor can it be accounted for, upon any known principle of law, that an underwriter, who had ſigned an adjuſtment of a loſs with a promiſe to pay it, might afterwards, merely becauſe he choſe to allege that *doubts had ariſen in his mind*, refuſe to pay the ſum he had acknowledged to be due; and that, merely on the ſuggeſtion of theſe doubts, the inſured ſhould be called upon at the trial to prove his whole caſe, at a time, too, when it was no longer, perhaps, in his power to procure the neceſſary evidence. The candour and fairneſs which ought to preſide in the litigation of all commercial queſtions, would never go the length of requiring this. If, indeed, the underwriters, harbouring theſe doubts, ſhould give the inſured reaſonable notice of their intention to diſpute his claim, it would be competent to them, perhaps, to do ſo; and even then, they ought to come prepared to ſhew ſome fraud or concealment on the part of the inſured; or ſome miſconception of the law or the fact, on their own part, which had induced them to agree to the adjuſtment. This would certainly make an end of the adjuſtment, and it would then be incumbent on the inſured, under whatever difficulty, to go into the proof of his whole caſe. It is poſſible, nay, very probable, that this, or ſomething like it, appeared in the caſe of *De Garron* v. *Galbraith*. But, as that caſe is reported, it cannot be deemed of ſufficient weight or authority to alter or ſhake the rule as laid down in the caſe of *Hog* v. *Gouldney*; and which, as has been already obſerved, is greatly enforced and confirmed by Lord *Kenyon*, in the caſe of *Rodgers* v. *Maylor*. (*b*)

But it is ſaid, that the ſpirit of the rule laid down in this laſt caſe, was adopted in the *very modern* caſe of *Thelluſon* v. *Fletcher*, (*c*) which has been already fully ſtated.

(*a*) Sup. 544.—(*b*) Vid *Chriſtian* v. *Coombe*, *Eſp.* Rep. 486, where Lord *Kenyon* lays down the ſame doctrine.—(*c*) *Thelluſon* v. *Fletcher* was determined 16 years *before* that of *De Garron* v. *Galbraith*.

ſtated. (*a*) - The only point determined in that caſe at all applicable to the preſent ſubject was, that, if an underwriter ſuffer judgment to go by default, he thereby confeſſes the plaintiff's title to recover, and the plaintiff ſhall not, therefore, be obliged to prove his intereſt; a point about which, without that deciſion, no lawyer could have entertained much doubt.—All that can be ſaid on this determination is, that, as far as it can be ſuppoſed to bear on the preſent queſtion, it corroborates the rule as laid down by Lord C. J. *Lee*.

(*a*) Sup. 105.

CHAP.

CHAP. XVI.

Of Return of Premium.

THE premium paid by the inſured, and the riſk which the inſurer takes upon himſelf, are conſiderations each for the other: They are correlatives, whoſe mutual operation conſtitutes the eſſence of the contract of inſurance. The inſurer ſhall not be expoſed to the riſk, without receiving the premium; nor ſhall he retain the premium, which was the price of the riſk, if, in fact, he runs no riſk at all. (*a*) For wherever a man receives the money of another upon a conſideration which happens to fail, or is never performed, he is under an obligation, from the ties of moral honeſty and natural juſtice, to refund it. In ſuch caſe, the law implies a debt, *quaſi ex contractu*, and gives the inſured an action againſt the inſurer, for money had and received to his uſe, to recover back the premium. (*b*)

It will be our buſineſs in the preſent chapter, to ſhew under what circumſtances the inſured ſhall be entitled to demand a return of premium.—The caſes in which the inſured ſhall be entitled to ſuch return, may be reduced to the following heads;

1. Where the contract is void *ab initio*;
2. Where the riſk has not been commenced;
3. Upon the performance of certain ſtipulations;
4. When the deduction of one half *per cent.* ſhall be allowed.

(*a*) Per Lord *Mansfield*, 3 *Bur.* 1240.—(*b*) Vid. 2 *Bur.* 1008; *Doug.* 454; *Comp.* 668; 1 *Show.* 156. 3 T. R. 266.

Sect. 1.

Of Return of Premium where the Contract is void ab initio.

IN general, when the contract is void *ab initio*, it is ſo, either for want of intereſt in the inſured, or becauſe the inſurance is illegal, or for fraud on the one ſide or the other.—We will inquire in what caſes there ſhall be a return of premium on each of theſe grounds.

1. *Where a Contract is void for Want of Intereſt.*

If an inſurance be made without intereſt, or for more than the real intereſt, there ſhall be a return of premium.

A want of intereſt may be either *total*, as where the inſured has nothing on board the ſhip; or *partial*, as where he has an intereſt in the thing inſured, but not to the amount ſtated in the policy. And it may be laid down as a general rule, that if, through miſtake, miſinformation, or any other innocent cauſe, an inſurance, in a ſingle policy, be made without any intereſt whatſoever in the thing inſured, or to a much larger amount than its real value; in the one caſe, the inſurer ſhall return the whole premium; in the other, he ſhall return upon all above the true value. Thus, if a man, ſuppoſing he has goods on board a certain ſhip to the value of 1000 l. inſure to that amount, but afterwards find either that he has no goods at all on board, or that he has goods only to the amount of half the inſurance: In the one caſe, he would be entitled to a return of the whole premium; in the other to a return of a moiety. (*a*) And all the underwriters upon a policy in which the effects are inſured beyond their value, muſt bear any loſs that may

(*a*) Vid. *Le Guidon*, ch. 2, art. 18, Ord. of *Amſt.* art. 22. *Pothier* h. t. n. 77, 183. *Roccus*, n. 82. *Valin*, ſur art. 23, p. 67.

may happen, and repay a part of the premium, in proportion to their reſpective ſubſcriptions, without regard to the priority of their dates. (*a*)

If there be an over-inſurance by ſeveral policies, the underwriters will all be liable to the extent of the value; and they will all be entitled to a return of premium for the reſidue.

If, by *ſeveral policies*, made without fraud, the ſum inſured exceed the value of the effects, theſe ſeveral policies will, in effect, make but one inſurance, and will be good to the extent of the true intereſt of the inſured; and, in caſe of loſs, all the underwriters on the ſeveral policies ſhall pay according to their reſpective ſubſcriptions, without regard to the priority of their dates. It follows from thence that all the underwriters on the ſeveral policies would be equally entitled to a return of premium for the ſum inſured above the value of the effects, in proportion to their reſpective ſubſcriptions.—In this particular, our law, as we have already ſhewn, (*b*) differs from the ancient law, and indeed from the law of moſt of the other maritime ſtates at this day.

Upon a wager policy the inſured cannot recover back the premium, at leaſt after the riſk is run.

We have already ſeen that a wager policy, at leaſt ſince the ſtat. 19 *G.* II. c. 37, is illegal and void. (*c*) Upon ſuch a policy the inſured cannot recover back the premium. At leaſt if he wait till the riſk is over, he ſhall not, after thus taking the chance of a loſs, and of obtaining from the *generoſity*, at leaſt, of the underwriters, the ſum inſured, be permitted to recover back the premium.

Lowry and another v. *Bourdieu*, *Doug.* 451.

The plaintiffs had lent one *Lawſon*, captain of the Lord *Holland* Indiaman, 26,000 l. for which he gave them a *common bond*. While he was with his ſhip at *China*, the plaintiffs got a policy underwritten by the defendant and others, "At and from *China* to *London*, "beginning the adventure upon the goods from the load-"ing thereof on board the ſaid ſhip at *Canton*, &c. and "*upon*

(*a*) Habet omnis aſſecuratio hoc peculiare, ut in ea non ſit prius nec poſterius, quantum ad effectum et validitatem contractus; ſed ultimus aſſecurator tantundem participat in damno et lucro ex aſſecuratione provenienti, quantum prior. *Kuricke* diatr. n. 16.—(*b*) Vid. ſup. 115, 116.—(*c*) Vid. ſup. ch. 4. § 2.

"*upon the ſaid ſhip* from her arrival at *Canton*, valued at "26,000 l., being the amount of Captain *Patrick Law-*"*ſon*'s common bond payable to the parties, as ſhall be "deſcribed at the back of this policy, dated 16th *Decem-*"*ber* 1775: And in caſe of loſs, no other proof of in-"tereſt to be required than the exhibition of the ſaid "bond; warranted free from average, and without ben-"efit of ſalvage to the inſurers."—At the head of the ſubſcription was written, "*On a bond as above expreſſed.*" —Captain *Lawſon* ſailed from *China* and arrived ſafe with his adventure in *London*.—The inſured brought an action to recover back the premium, on the ground that the inſurance having been made without intereſt, the policy was void, within the ſtatute. (*a*) There was a verdict for the defendant by the direction of Lord *Mansfield*, who tried the cauſe, upon the ground that, though the policy was void, as being without intereſt, yet that both parties were equally guilty of a breach of the law, and therefore the rule *in pari delicto, melior eſt conditio poſſidentis* applied, and the plaintiffs could not recover back the premium. Upon a motion for a new trial, the court adopted this opinion.—Lord *Mansfield* ſaid,—"This is clearly a gaming policy. The nature of the inſurance is known to both parties. The plaintiffs ſay; 'We mean to game; but we give our reaſon for it; captain *Law-ſon* owes us a ſum of money, and we want to be ſecure in caſe he ſhould not be in a ſituation to pay us.' It was a hedge. But they had no intereſt; for, if the ſhip had been loſt, and the underwriters had paid, ſtill the plaintiff would have been entitled to recover the amount of the bond from *Lawſon*.—This, then, is a gaming policy, and againſt an act of parliament; and therefore it is clear that the court will not interfere to aſſiſt either party; according to the well known rule, that, *in pari delicto melior eſt conditio poſſidentis*: Not, that the defendant's right is better than that of the plaintiff; but he muſt draw his remedy from clear fountains."—Mr. Juſtice

(*a*) 19 *G.* II. c. 37, ſup. 103.

tice *Aſhurſt* concurred in this opinion. Mr. J. *Willes* thought that this was not a gaming policy; that the money was paid upon a miſtaken idea, and ought to have been refunded.—Mr. Juſtice *Buller* agreed with Lord *Mansfield* and Mr. Juſtice *Aſhurſt*, that this was a gaming policy, being without intereſt: But he held that the reaſon why the plaintiffs could not recover was, that an action brought to reſcind a contract, muſt be brought while the contract continues executory; and then it can only be done on the terms of reſtoring the other party to his original ſituation. He mentioned a caſe of *Walker* v. *Chapman*, in B. R. ſome years before, where a ſum of money had been paid in order to procure a place in the cuſtoms. The place had not been procured, and the party who paid the money, having brought his action to recover it back; it was held that he ſhould recover, becauſe the contract remained executory. "So," ſaid he, "if the plaintiffs in this caſe had brought an action before the riſk was over, they might have recovered; but having waited till the riſk was run, it was then too late." (*a*)

Yet, before the riſk is run, and while the contract is executory, the inſured may recover back the premium.

The reader, in peruſing the foregoing caſe, muſt have obſerved that though Mr. Juſtice *Buller* concurs in opinion

(*a*) There is a caſe of *Wharton* v. *De la Rive*, (at N.P. after Mich. 1782,) mentioned in *Park* 376, where an action is ſaid to have been brought on two wagers, "one of 26l. 5s. to 100l.: the other of 13l. 2s. 6d. to 30l." that the *American* colonies would be acknowledged as independent ſtates by *France*, ſometime between the firſt of *February* and the firſt of *April* 1778. It is ſtated, that upon the opening of the caſe for the plaintiff, Lord *Mansfield* directed a nonſuit, but it does not appear upon what ground; whether becauſe the wagers were illegal, or becauſe they were in nature of wagering inſurances, and void by the act. It is ſaid, however, that the plaintiff's counſel inſiſted on a verdict for the premium, as if they were in fact inſurances, which Lord *Mansfield* permitted, upon the ground of the contract being void. The caſe of *Lowry* v. *Bourdieu* was then cited by the defendant's counſel, to ſhew that he was entitled to keep the premium. Lord *Mansfield* is made to anſwer,

ion with Lord *Mansfield*, that the insured was not, under all the circumstances of the case, entitled to a return of the premium, yet he assigns a different reason for his opinion.—Lord *Mansfield* considered the insurance as an illegal contract, and both parties offenders against the law; and then founds his judgment on the maxim, *in pari delicto melior est conditio possidentis*; from which it may be inferred that it was his lordship's opinion, that, even if the insured had thought proper to rescind the contract before the risk commenced, or, which is the same thing, before the event was known, he could not have recovered back the premium.—Mr. Justice *Buller* takes a different ground; namely, that though an action might have been maintained to recover back the premium, while the contract was *executory*, upon the terms of restoring the underwriter to his original situation; yet, after the risk is run, it is too late to attempt to rescind the contract.

In the case of *Vandyk* v. *Hewet*, which we shall presently have occasion to mention more particularly, the court of King's Bench seems to have adopted the principle upon which Lord *Mansfield* founded his judgment. It would seem, therefore, that Mr. Justice *Buller*'s doctrine would apply only to the case of an insurance without interest, *innocently* made.

If the contract be void, as being a re-insurance, there shall be no return of premium.

Upon the authority of this case it has since been determined, that if the contract be void, as being a re-insurance, within the stat. 19 *G.* II., c. 37, § 4., the insured shall not be entitled to a return of premium. (*a*)

If

answer, that it did not apply, as, in that case, the *risk had been run*. But that could not distinguish it from the case before his lordship, because, if these wagers were to be considered as insurances, the risk was over on the first of *April* 1778, five years before the action was brought. Nay, the action was brought on the ground that the plaintiff had won his wager.

(*a*) R. *Andrée* v. *Fletcher*, 3 T. R. 166.

If the insurer could ever have been called upon to pay the sum insured, there shall be no return of premium.

If, under any circumstances, the insurer might, at any time, have been called upon to pay the whole sum insured, the premium is earned, and he shall not be obliged to return any part of it. Therefore, in the case of a valued policy, though the sum in the policy be twice the value of the effects insured, there shall be no return of premium. (*a*)

Captors having insurable interest in their prize before condemnation; if they insure, they shall not have a return of premium, though it should be afterwards adjudged no prize.

If the insured have a contingent insurable interest in the thing insured at the time when the policy is effected, and the risk be once begun, there shall be no return of premium, though it should eventually turn out that he had no title to the thing insured. Therefore, the following case will shew, that though the captors of a ship seized as prize have an insurable interest therein before condemnation; yet, should the ship afterwards be adjudged to be no prize, and restitution be awarded to the owners, there shall be no return of premium, if the risk was commenced.

Boehm and others v *Bell*, 8 T. R. 154.

Three frigates having taken the ship *Westcapelle* off the *Cape of Good Hope*, then bound from *Batavia* to *Boston*, the captors put her under the command of a lieutenant, as prize-master, and on the 30th of *January* 1797, wrote to their agents in *England*, mentioning the capture of the *Westcapelle*, formerly a *Dutch East India* ship, but then navigated under *American* colours from *Batavia*, by the name of the *George* of *Boston*, manned with a crew above two thirds *Dutch*, which they supposed a lawful prize; and stating, that as there was no court of admiralty there, they were under the necessity of sending her to *England* for trial; and then directed an insurance for that voyage to be made on the ship and cargo, to the amount of 40,000 l. (though the estimated value was 150,000 l.) which the agents in *England*, accordingly caused to be effected at a premium of 20 guineas *per cent.* to return 8 l. *per cent.* if the ship departed from the *Cape* or *St. Helena*, with convoy for *England*, and arrived. The ship sailed from the *Cape* with convoy for *St. Helena*, where she arrived, and sailed from thence for *England*, without convoy, and arrived

(*a*) 2 *Magens*, 137.

arrived in ſafety in the *Thames* on the 7th of *Auguſt* 1797. But the court of admiralty 'declared the ſhip and cargo to 'be *American* property, and decreed them to be reſtored, 'except the part claimed by the chief mate, who was pro-'nounced to be an enemy, and his property on board con-'demned as lawful prize.' The ſhip and cargo, except the part of the chief mate, were reſtored accordingly. After this ſentence, the plaintiffs brought an action againſt the defendant, to recover 18 l. 19 s. 10 d. *per cent.* as a proportion of the premium to be returned, in reſpect of the ſhip and ſuch part of the cargo as had been decreed to be reſtored. Upon the trial of the cauſe, the jury found a verdict for the plaintiffs, ſubject to the opinion of the court upon a caſe, which ſtated the above facts. —When the caſe came before the court, the defendant inſiſted that the inſured had an inſurable intereſt to the amount of the ſum inſured, and, in the event of a loſs, might have recovered againſt the inſurers. That the fallacy of the plaintiff's argument aroſe from not diſtinguiſhing between an *inſurable intereſt* and an *abſolute indefeaſible property*. That the inſured had the poſſeſſion of the thing inſured, together with a contingent intereſt in the event of its being condemned; beſides, they had an immediate intereſt in the ſubject matter, ariſing out of their reſponſibility for the care and ſafety of the ſhip; for in caſe of groſs negligence or miſconduct, the court of admiralty would adjudge a compenſation to the owners in damages; and if, in any event, the inſurers might have been anſwerable, there could be no return of premium. 2dly. That this being a valued policy, made *bonâ fide*, without any intention of fraud, and the inſured having an indiſputable intereſt, the extent of the intereſt was immaterial. 3dly. That as this was an inſurance on foreign ſhips, it was not neceſſary that the inſured ſhould have any intereſt at all, it not being within the ſtat. 19 *G.* II. c. 37.—The court were clearly of opinion, that the inſured had an inſurable intereſt, and that the riſk having been run, there could be no return of premium.—Lord *Kenyon* ſaid,—"I will not enter into a diſcuſſion of either of the two laſt points made by the defendant's

defendant's counſel, becauſe the firſt alone furniſhes, in my opinion, an anſwer to this action.—The real queſtion in this caſe is one of the moſt ſimple that can be ſtated. It is merely this, whether the inſured had or had not *any intereſt*. The captors had the poſſeſſion of the property inſured, and from that poſſeſſion certain rights and duties reſulted. If it were a legal capture, the captors were entitled; if not, they were liable to be called to an account in the court of admiralty, where they might be amerced in damages and coſts. It was important, therefore, to them to take care that there ſhould be ſomething forthcoming to anſwer for the amount of theſe damages."

2. *Where the Inſurance is void, being upon a Trading with the Enemy.*

Though an inſurance to protect a trading with the enemy is void; yet the inſured ſhall not recover back the premium.

It has already been ſhewn that no *Britiſh* ſubject can legally carry on any commerce with the enemies of the ſtate, without the King's licenſe; and that an inſurance made to protect ſuch a trading is void. (*a*) In the following caſe it was determined that the inſured, in ſuch an inſurance, cannot recover back his premium: And though this was after a loſs had happened, it was after the inſurers had availed themſelves of the illegality of the contract to avoid paying the loſs, and it was founded upon the ſame principle upon which Lord *Mansfield* founded his judgment in the caſe of *Lowry* v. *Bourdieu*, (*b*) which would have ſupported the deciſion in that caſe, even if the action had been brought while the contract was executory.

Vandyk & others v. *Hewit*, 1 *Eſp* 96.

An inſurance was made on goods at and from *London* to *Embden* or *Amſterdam*, at a premium of ten guineas *per cent.*, to return five upon their arrival at their place of deſtination.—In an action on this policy for a loſs by capture, it was averred in the declaration that the inſurance was made for the benefit of certain perſons therein named.—Upon the trial of the cauſe it appeared that the goods were ſhipped on board a *Pruſſian* neutral veſſel, on

(*a*) Vid. ſup. 70.—(*b*) Sup. 551.

on account, partly of the plaintiffs who were naturalized foreigners reſident in *London*, and partly of certain other perſons, aliens, then reſident in *Holland*. It appearing that the inſurance was intended to cover a trading with *Holland*, that country then being at war with this kingdom, the idea of recovering the loſs was given up on the authority of the caſe of *Potts* v. *Bell* (*a*).—The plaintiffs then contended that they were entitled to recover back the premium, on the ground that the policy never attached, and the riſk had therefore never commenced. And it was compared to the caſe of *Lacauſſade* v. *White*, (*b*) in which it was determined that a perſon who has depoſited money upon an illegal wager may recover it back, even after the event is determined againſt him.—Lord *Kenyon*, who tried the cauſe, permitted a verdict to be taken by the plaintiff for the premium, with liberty for the defendant to move to ſet that verdict aſide, and enter a verdict for the defendant.—Upon that motion, the court were clearly of opinion, that the plaintiffs had no right to recover back the premium.—Lord *Kenyon* ſaid;—"There is no diſtinguiſhing this caſe, on principle, from the common caſe of a ſmuggling tranſaction.—Where the vendor aſſiſts the vendee in running the goods to evade the laws of the country, he cannot recover back the goods themſelves or the value of them.(*c*) Both parties are *in pari delicto*, and *potior eſt conditio poſſidentis*."

If the contract be void, on account of a non-compliance with any warranty, expreſs or implied; as if the ſhip do not ſail on the day preſcribed, or do not depart with convoy; or be not ſea-worthy; and there be no fraud imputable to the inſured; he ſhall be entitled to a return of premium; becauſe the contract never attached, and the riſk, therefore, never commenced. In ſuch caſe, it

Where the policy is void, and there is no fraud imputable to the plaintiff, he is entitled to a return of premium.

(*a*) 8 T. R. 548, ſup. 73.—(*b*) 7 T. R. 535. But Vid. 8 T. R. 575, where it was held that if the money depoſited upon an illegal wager be paid over to the winner, it cannot be recovered back.—(*c*) Vid. *Biggs* v. *Lawrence*, 3 T. R. 454. *Clugas* v. *Penaluna*, 4 T. R. 466. *Weymell* v. *Reed*, 5 T. R. 599.

it is always adviſable for the defendant, in an action on the policy, to bring the premium into court; otherwiſe the inſured will have the advantage of trying the queſtion on the validity of the contract, without the peril of coſts; for, at the worſt, he will be ſure of a verdict for the premium. (*a*) And it is not unuſual when the jury have brought in their verdict for the defendant, on the only queſtion ſubmitted to them, for the plaintiff's counſel to claim a verdict for the premium, upon the count for money had and received.

When the plaintiff is entitled to a return of premium, he may claim a verdict for it, even after the jury have delivered their verdict for the defendant, on the principal queſtion.

Indeed it has been the conſtant practice, for the plaintiff's counſel to abſtain from any mention of the premium, where he means to claim a loſs; becauſe, by ſetting up a demand for the premium, he confeſſes a *doubt*, at leaſt, of his being able to ſuſtain his principal claim; and throwing out ſuch a doubt, in a caſe already, perhaps, doubtful, may be very injurious to his client's intereſt. And it may be ſaid, moreover, in favour of this practice, that the defendant may come prepared to diſpute the plaintiff's claim to a return of premium, and may prove fraud, which will not be inconſiſtent with any other defence he may have to make; whereas it often happens that the plaintiff's claim to a return of premium reſts on the very caſe made by the defendant. (*b*)

But the court will not, on ſetting aſide a verdict for a loſs, ſubſtitute a verdict for the premium.

If the queſtion of return of premium be not agitated at the trial, and a verdict be taken for the plaintiff for the loſs, ſubject to the opinion of the court upon any point that may be reſerved, and that point be decided againſt the plaintiff; it will be too late then to ſet up his claim to a verdict for the premium; for the court cannot find a new verdict, or ſubſtitute any other ſum in lieu of that which the jury gave in damages. (*c*)

3. *When there is Fraud on the one Side or the other.*

If the policy be void for fraud on the part of the inſurer, the premium ſhall be returned.

When the policy is void on account of fraud committed by the inſurer, there can be no doubt but that an

(*a*) Vid. inf. ch. 17, § 4.—(*b*) Vid. *Penſon* v. *Lee*, 2 *Boſ.* & *Pul.* 330, in which this queſtion was very much canvaſſed.—(*c*) R. *Neſbit* v. *Whitmore*, 1 *Eaſt* 97, n.

an action will lie to recover back the premium. As if an insurance be made on a certain voyage, lost or not lost, when the insurer, at the time he enters into the contract, privately knows that the ship is arrived safe; he will be bound to restore the premium. (*a*)

Whether this be so, where fraud has been committed by the insured.

But whether the insurer be bound to return the premium in a case where fraud has been committed by the insured, is a question upon which more doubt might be entertained.—On the one hand, it might be contended that as the underwriter receives the premium in consideration of his taking upon himself the risk mentioned in the policy, he can have no right to retain it, if no risk was ever run; and, however improperly or unfairly the insured may have conducted himself, that will not furnish a new consideration to the underwriter, to be substituted in the place of that which was expressed in the policy, so as to enable him to retain the premium.

On the other hand, it might be deemed a sort of solecism in our law, if the insurer could, by paying a premium, take the chance of reaping the proposed advantage from a fraudulent insurance; and yet, if detected, he shall be entitled to recover back his premium, and so suffer no loss. It has been said, indeed, that the idea of enriching one man by the punishment of another is a strange one, and somewhat inconsistent with the present notions of criminal justice. (*b*)—But this idea is not strange in our law; for it pervades all our statutes in which penalties are given to common informers. It is true that the legislature gives these penalties, not for the sake of enriching the informers, but to tempt them, by the hopes of enriching themselves, to bring offenders to justice. When a penalty is given to the party grieved, it is given for the express purpose of enriching him by the punishment of the wrongdoer. Upon the same principle, a security given to a lender upon an usurious contract is declared void by the stat. 12 *An.* c. 16,

(*a*) Per Lord *Mansfield*, in *Carter* v. *Boehm*, 3 *Bur.* 1909, *sup.* 347.—(*b*) *Park* 215.

c. 16, § 1.; and yet the borrower, who is a party to the illegal contract, ſhall never be obliged to repay it. Nor is this principle confined to the ſtatute law; for, by the common law, the vendor of ſmuggled goods ſhall not be allowed to recover the price of them from the vendee, though he be far from innocent of the fraud againſt the revenue. (*a*) Many other inſtances might be adduced from the common law to ſhew that one party ſhall be permitted to enrich himſelf by the puniſhment of another, even where they are both *in pari delicto*. (*b*) And it would ſeem from the opinion of Lord *Mansfield* in *Lowry* v. *Bourdieu*, (*c*) and that of Lord *Kenyon* in *Vandyk* v. *Hewet*, (*d*) that, in the caſe of a gaming policy, the inſured cannot recover back his premium, even where the riſk has never been commenced. How much ſtronger, in point of juſtice, is the claim of an innocent underwriter to retain the premium of an inſurance, by which the inſured meant to defraud him, and which is ſome ſatisfaction for the riſk he has run, though not an adequate puniſhment of the inſured for the fraud he meditated.

It has been determined that there ſhall be a return, if the contract be void for fraud committed by the inſured.

But reaſonable and juſt as this idea may ſeem, it has not always prevailed. The court of chancery, in two inſtances ordered a return of premium where the policies were declared void for fraud committed by the inſured.

Wittingham v. *Thornburgh*, 2 *Vern.* 206. Pr. in ch. 20.

The firſt of theſe caſes was an inſurance on the life of one *Horwell*, for a year, intereſt or no intereſt. The inſured, in order to draw in ſubſcribers, agreed with one *Marwood*, a neighbour of *Horwell*'s, an eminent merchant who was a leading man in ſuch caſes, to ſubſcribe firſt; but he was to loſe nothing, in caſe *Horwell* died within the year, but, on the contrary, was to ſhare what ſhould be gained by the other ſubſcribers. Upon the credit of *Marwood*'s ſubſcribing, ſeveral others, (who had inquired of him about *Horwell*,) ſubſcribed likewiſe. *Horwell* lived but four months; and a bill being brought to

(*a*) Vid. 3 T. R. 454; 4 T. R. 466; 5 T. R. 599.—(*b*) Vid. 3 T. R. 454, *Cowp.* 343.—(*c*) Sup. 551.—(*d*) Sup. 557.

to be relieved againſt the policy, and it appearing that the inſured had no intereſt in the life of *Horwell*, who was in a languiſhing condition at the time the inſurance was effected, the court decreed the policy to be delivered up to be cancelled; but the premium was to be *repaid*, the plaintiffs deducting their coſts thereout.

Da Coſta v. *Scandaret*, 2 P. W. 170. ſup. 351. 8. P.

The other caſe was an inſurance on a ſhip, where the inſured was guilty of a fraudulent concealment, for which the court of Chancery ordered the policy to be delivered up to be cancelled; but, in like manner, directed the premium to be *paid back*, and allowed out of the coſts.

The ſame doctrine adopted in a court of law.

This rule of the court of Chancery, was firſt adopted at law, upon the authority of the above two caſes, in an action brought on a policy of inſurance on a ſhip, with a count for money had and received by the defendant to the plaintiff's uſe.—The cauſe was tried under a decree of the court of Chancery, where the inſured, (being then plaintiff,) offered to pay back the premium, which was 10 l.; but no money was paid into court *in this action*.—There was a verdict for the plaintiff for the 10 l. premium, on the count for money had and received, although the jury found the policy to have been *fraudulent*. In fact, in this caſe, like the laſt, the firſt underwriter was only a decoy-duck to miſlead others, and was not himſelf to be bound by the policy.—But it was agreed to bring before the court this queſtion.—"Whether, upon a policy being found *fraudulent*, the premium ſhould be returned." In ſupport of the affirmative, the two laſt mentioned caſes were cited on the part of the inſured. On the other ſide was mentioned a caſe of *Rucker* v. *Hollingbury*, before the Maſter of the Rolls, who held an opinion contrary to thoſe caſes.—But Lord *Mansfield* ſaid there muſt have been ſome miſtake in the ſtatement of this caſe; for the practice of the court of Chancery was certainly agreeable to the former caſes: He then inquired whether there was any common law determination to the ſame effect, and it not appearing that there was, he ſaid it was plain what muſt be done in this caſe: For he looked upon the

Wilſon v. *Duckett*, 3. *Bur.* 1364.

offer

offer made by the underwriter's bill in equity to be the ſame thing as if the money had been *actually* brought into court in the preſent cauſe: Therefore the verdict for the plaintiff was ſet aſide, and a verdict entered for the defendant.

It has been ſaid, however, of this caſe, "that a trial being had under a decree of the court of Chancery, and the inſurer having there made an offer of returning the premium, the court of King's Bench conſidered the offer in the ſame light as if he had paid the money into court, and therefore the queſtion *remained undecided. (a)* But, from the mode of diſpoſing of this caſe, it is plain that, if the underwriter had not done what was deemed equivalent to bringing the money into court, there would have been a verdict againſt him for the premium. The court, therefore, clearly decided that the inſured was entitled to a return of premium. And this deciſion had the more weight as it may be fairly concluded, from the groſs miſconduct of the inſured, and from the expedient adopted by the court to ouſt him of the coſts at law, that this point was decided in his favour with much reluctance.

But the courts now hold a contrary doctrine.

But, be this as it may, Lord *Mansfield*, upon better reflection, ſaw at length, the impolicy, not to ſay injuſtice, of permitting the inſured to take his chance of defrauding the underwriters, without the riſk of loſing even his premium.—Therefore where an action was brought on a policy for a total loſs, and it appeared to the ſatisfaction of the jury, that the plaintiff had given the order to his broker to get the inſurance effected, after he had received information of the loſs of the ſhip, the jury found a verdict for the defendant; and Lord *Mansfield*, who tried the cauſe, ſaid the fraud was ſo groſs, that the plaintiff ought not to recover the premium from the underwriters.

Tyler v. *Hern*, at N. P. after Hil. 1785, *Park*, 218.

The fraud was certainly very groſs in this caſe, but not more groſs than in each of the three preceding caſes, which we

(a) *Park*, in index tit. *Return of premium*.

we have cited.—But this important question has been since finally settled in a case which came before the court of King's Bench, and where the fraud had been committed, not by the insured himself, but by his agent; and the whole court were of opinion that, in all cases of *actual fraud*, on the part of the insured, committed either by himself or his agent, the underwriter shall retain the premium.

Chapman and others, assignees of *Kennet* v. *Fraser*, B. R. Tr. 33 G. III. *Park*, 218.

Sect. 2.

Where the Risk has not been commenced.

ALL the foreign authors agree that insurance is a conditional contract, that the risk is of the essence of it, and that the premium is the price of the risk to be run: Yet many of them hold that the insured is not permitted to dissolve the contract by his own act; and therefore if he relinquish the intended voyage, the insurer is not bound to return the premium, and that he has even a right to demand it, if it has not been already paid. (*a*)—They except only the case where it becomes impossible for the insured to ship the goods, or to cause the ship to proceed on her voyage. (*b*)

Foreign authors maintain that the insured cannot, by his own act, dissolve the contract, and demand a return of premium.

But

(*a*) An assecurator teneatur restituere pretium, eò quod in navi non fuerunt merces? Videbatur teneri assecurator ad restitutionem pretii recepti ob causam illius periculi; tamen in contrarium est veritas, quòd non solum non teneatur pretium restituere, imo possit petere illud; et ratio est, quia licet emptio periculi non teneat in præjudicium promissoris, tamen in ejus favorem, et in præjudicium assecurati falsa assertio bene tenet. Sic etiam quia illa causa cessat, facto domini mercium, eò quod nullas merces misit in navem, et non facto assecuratoris, per quem non stetit. *Roccus*, h. t. not. 11, 13, 14, 82, 88; vid. *Santerna*, part. 3, n. 19, 20, 22; *Straccha*, gl. 6. *Casaregis*, disc. 1, n. 53, 58.—(*b*) In casibus in quibus impeditur navigatio, putâ si navis sit combusta in portu, vel destructa, vel rex eam capiat pro necessitatibus publicis, et impeditur conditio assecurationis: quia tunc non posset imputari conditionis defectus magis uni, quam alteri parti, nullas tenebitur; et pretium periculi

In *Holland* and *France*, the law is different.

But the rules which prevail in *Holland* and *France* are more conformable to the nature of the contract of insurance. In *Holland*, if the goods insured should not be shipped, or should appear to be of less value than the sum insured, the insured may, in the one case, demand a return of the whole premium, in the other, a return for what is over-insured. (*a*)—In *France*, if a stop be put to the voyage before the ship sails, *even by the act of the insured*, the insurance becomes void, and the insurer shall return the premium. (*b*)

In *England* it is a general rule that if the risk be not begun, to whatever cause this be owing, the premium shall be returned.

In *England*, the rule is, that where the risk has not been begun, whether this be owing to the fault, pleasure, or will of the insured, or to any other cause, the premium shall be returned. The reason is, that a policy of insurance is a contract of indemnity; the underwriter receives the premium for running the risk of indemnifying the insured; and therefore if he do not run the risk, to whatever cause this may be imputable, the consideration for which the premium was paid to him fails, and he ought to return it. (*c*)

But where the the voyage and premium are divisible, and any part not begun, the premium for that part shall be returned.

But if the insurance be upon a voyage which is divisible into several distinct risks, and which are, in effect, several distinct voyages, the premium may be apportioned according to these several risks; and in case one or more of these risks should not have been commenced, the proportion of premium applicable to those parts shall be returned.

Thus:

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periculi non potest peti, et solutum repetitur, quasi causâ non secutâ. *Roccus*, h. t. not. 15, 56.—Si, ex aliquo impedimento, assecuratus non potuisset merces suas onerare, tunc contractus assecurationis locum non haberit, ita ut si pretium assecurationis fuisset solutum, repeti certo poterit per assecuratum. *Casaregis* disc. 1, n. 182, disc. 62, n. 4. Vid. *Le Guidon*, ch. 9, art. 16, which is nearly to the same effect. Vid. Ord. of *Antwerp*, art. 16. 2 *Magens*, 27. *Locennius*, lib. 2, ch. 5, n. 16.—(*a*) Ord. of *Amsterdam*, art. 23, 2 *Mag.* 136.—(*b*) Ord. of *Louis* XIV. h. t. art. 37. Vid. *Emerig.* tom. 2, p. 154. *Pothier*, h. t. n. 178, 179.—(*c*) Per Lord *Mansfield*, in *Tyrie* v. *Fletcher*, *Cowp.* 668.

Thus:—A ſhip was inſured, "At five guineas *per* "*cent.* loſt or not loſt, at and from *London* to *Halifax*, "warranted to depart with convoy from *Portſmouth* for "the voyage."—Before the ſhip arrived at *Portſmouth*, the convoy was gone. Notice of this was immediately given to the underwriters, who were deſired, either to make the long inſurance or return part of the premium. They refuſed, and the inſured brought an action to recover a part of the premium. At the trial, a caſe was reſerved for the opinion of the court, ſtating the above facts, and alſo ſtating, that the jury found that the uſual and ſettled premium from *London* to *Portſmouth* was one and one-half *per cent.* which the plaintiff offered to allow the defendant to retain; and that it was uſual for the underwriters, in ſuch caſes, to return part of the premium: But the *quantum* was uncertain, and muſt in its nature be ſo; becauſe it depended upon uncertain circumſtances.—Upon this caſe, the court were unanimouſly of opinion that the plaintiff was entitled to recover.—Lord *Manſfield* ſaid,—"Theſe contracts are to be taken with great latitude: The ſtrict letter is not ſo much to be regarded as the object and intention of the parties. Equity implies a condition that the inſurer ſhall not receive the price of running a riſk, if he runs none. The premium is without conſideration, as to the voyage from *Portſmouth* to *Halifax*; and then this caſe is within the general principle of actions for money had and received. I do not go upon the uſage, which is only that, in like caſes, a *part* of the premium is returned, without aſcertaining *what* part. If the riſk be not run, though it be by neglect, or even the *fault*, of the inſured, yet the inſurer ſhall not retain the premium. It has been objected that the voyage being begun, and part of the riſk already run, the premium cannot be apportioned: But I can ſee no force in this. This is not a contract ſo entire that there can be no apportionment: For there are two parts in it, and the premium may be divided into two diſtinct parts relative, as it were, to two diſtinct voyages. The practice ſhews that it has been uſual, in ſuch caſes, to return a part of the

A ſhip is inſured at and from *London* to *Halifax*, warranted to depart with convoy from *Portſmouth*, at five guineas *per cent.* On her arrival at *Portſmouth*, ſhe finds the convoy gone. Notice of this is immediately given to the inſurer.—The premium ſhall be apportioned.

Stephenſon v. *Snow*, 3 *Bur.* 1237.

the

the premium, though the *quantum* be not aſcertained: And indeed the quantum muſt vary as circumſtances vary. But though the *quantum* has not been aſcertained, yet the principle is agreeable to the general ſenſe of mankind."—Mr. Juſtice *Deniſon*, and Mr. Juſtice *Foſter*, concurred in this opinion.—Mr. Juſtice *Wilmot* ſaid,—"The uſage to return a part of the premium, in ſuch caſes, is a ſtrong proof of the equity of the thing; and nothing can be more juſt and reaſonable. If the riſk be once begun, the inſured ſhall not deviate or return back, and then ſay, I will go no further under this contract, but will have my premium returned. Upon this policy, there are two diſtinct points of time, in effect two voyages, which were clearly in the contemplation of the parties; and only one of the two voyages was made, the other was not at all entered upon, nor was the riſk ever begun." (*a*)

In the following caſe, though the facts did not enable the court to pronounce any definitive judgment upon this point; yet, in ſending it back to a new trial, an opinion was delivered which tends to ſtrengthen the authority of the above deciſion.

A ſhip is inſured from *Hull* to *Bilboa*, warranted to depart from *England* with convoy. The voyages from *Hull* to *Portſmouth*, the place of rendezvous, & from *England*, thence to *Bilboa*, may be conſidered as diſtinct.

An inſurance was made on the ſhip *Manning*, "At "and from *Hull* to *Bilboa*, warranted to depart from *Eng-* "*land* with convoy."—The ſhip ſailed from *Hull* to *Portſmouth*, and from thence departed with a convoy; but this not being direct for *Bilboa*, ſhe left it, and was afterwards captured.—In an action on this policy, upon the above facts coming out in evidence, the plaintiff would have been nonſuited; but his counſel inſiſted that he was entitled to a return of premium; and there being a count in the declaration for money had and received, and no

(*a*) Vid. Lord *Mansfield*'s obſervations on this caſe, (*Cowp.* 669, inf. 575,) in which he labours to vindicate the deciſion of it, by ſhewing that the grounds of it were that the voyage was in fact *two voyages*, and that the contract compriſed *two diſtinct conditions*. Vid. alſo the obſervations on this and the other caſes on this point. 1 *Pul. & Boſ.* 174.

no money paid into court, a verdict was given for the plaintiff for the whole premium.—Upon a motion to set aside this verdict and enter a nonsuit, it was contended on the part of the defendant, that as the risk had commenced, the plaintiff could not be entitled to any return of premium.—On the part of the plaintiff, it was insisted that there were two distinct voyages in this case; the one from *Hull* to the place of rendezvous, and the other from thence to *Bilboa*, the port of discharge; that the risks were of different natures, one being without, the other with, convoy; and that, as the latter was never begun, the plaintiff must at all events be entitled to return a proportion of the premium on that account.—The court directed the verdict to be set aside, and granted a new trial, being of opinion that if the underwriters were not entitled to retain the whole premium, yet, having ran the risk from *Hull* to *Portsmouth*, they were at least entitled to retain a proportion of it, if, upon a further investigation, it should turn out that the voyage was divisible, and that the premium in such cases had ever been apportioned. (*a*)

And in case the ship sails without convoy and is taken, the premium may be apportioned, and a part returned.

Rothwell v. *Cooke*, 1 *Pul. & Bes.* 172.

Yet, where an insurance is made on a ship, "*at and from*" her port of departure, and warranted to sail on or before a given day, and the ship does not sail within the time required by the warranty, by which the insurer is discharged, it has been holden that the risk at and from the port of departure is entire, and not divisible into two distinct risks, and therefore the premium cannot be apportioned so as to entitle the insured to any return.

Yet, upon an insurance "*at and from*" a place, the risk is not divisible.

Thus:—A ship was insured "At and from *Jamaica* to "*Liverpool*, warranted to sail on or before the first of "*August*; premium twenty guineas *per cent.* to return "eight, *if she sailed with convoy.*"—The ship did not sail till *September*, and was lost in the voyage.—The warranty, as to the time of sailing, not being complied with, the underwriters

A ship is insured "*at and from Jamaica* to *Liverpool*, warranted to sail on or before the first of *August*; premium 20 guineas *per cent.* to return 8 guineas if she sailed with convoy." She did not sail till *September*. The insured shall

(*a*) This upon memory, seems to be the result of what was done by the court, though not fully expressed in the printed report.

only be entitled to 8 guineas *per cent.* for convoy, and not to an apportionment of the reſt of the premium.

Meyer v. *Greg-ſon*, B. R. Eaſt. 24 G. III. MS.

underwriters were diſcharged from the riſk after the firſt of *Auguſt*, and an action was brought by the inſured for a return of premium.—The defendant, who was an underwriter for 100 l. paid eight guineas into court, being the ſum to be returned, if the ſhip ſailed with convoy.—The jury apportioned the premium, and gave eight guineas more for the riſk from *Jamaica* to *Liverpool*; which they conſidered as not having been commenced; thus allowing four guineas for the riſk "*at Jamaica.*"—The defendant moved to ſet aſide the verdict, and enter a nonſuit upon the ground that the riſk was entire, the premium was entire, and the voyage indiviſible.—Lord *Mansfield*, Mr. Juſtice *Aſhurſt*, and Mr. Juſtice *Buller*, (againſt the opinion of Mr. Juſtice *Willes*, who thought with the jury, that the premium ſhould be apportioned,) determined that the inſured was not entitled to recover more than had been paid into court, and therefore the rule was made abſolute.—Lord *Mansfield* ſaid,—"It would be endleſs to go into an inquiry about the value of the riſk "*at Jamaica*;" which is different at different ſides of the iſland: The parties divided the riſk, as to convoy; for eight guineas were to be returned if the ſhip ſailed with convoy. Independent of that, it was an inſurance "At and from *Jamaica* to *London*," at 12 guineas *per cent.* with an abſolute warranty to ſail "on or before the 1ſt of *Auguſt*," and nothing is ſaid from whence it can be inferred that it was meant that there ſhould be two riſks, or by which the riſk at *Jamaica* could be diſtinctly eſtimated." (*a*)—Mr. Juſtice

(*a*) Lord *Mansfield*, in delivering his opinion in the caſe of *Tyre* v. *Fletcher*, *Cowp.* 670, inf. 574, ſeems to have entertained a different ſentiment on this point. He then inclined to think that if the words of the policy were "*at and from*, provided the ſhip ſhall ſail on or before the firſt of *Auguſt*," it would fall within the reaſoning of *Stevenſon* v. *Snow*, and that there would then be two parts, or contracts, of inſurance, with diſtinct conditions. But this can only be conſidered as an extra-judicial opinion expreſſed very doubtfully.

Juſtice *Buller* ſaid,—"As the parties have not conſidered it as two riſks, nor eſtimated the riſk "*at Jamaica*," neither the court or jury have any right to do it for them. In all the inſurances from *Jamaica*, the policy runs "*at and from*;" and though, in many inſtances, the voyage has not been commenced, yet there never was an idea of any part of the premium being returned; and no uſage to do ſo has been found by the jury."

Upon an inſurance *at and from* a place, an uſage ſhould be proved to warrant a diviſion of the riſk.

In a ſubſequent term the following caſe came before the ſame court; and though the point was not decided by the judges, yet Lord *Manſfield*, in directing a new trial, laid down the principle, which he conceived ought to govern theſe caſes, in terms which ſeem more reconcileable to the caſe of *Stevenſon* v. *Snow* (*a*) than to the laſt cited caſe of *Meyer* v. *Gregſon*.

A ſhip was inſured, "*At and from* any port or ports "in *Jamaica* to *London*, following and commencing from "her firſt arrival there; warranted to ſail with convoy "for the voyage, from the place of rendezvous."—The ſhip did not get time enough to the place of rendezvous to ſail with the convoy,—but ſailed after, and overtook them; ſo that the warranty was not complied with, and the underwriters were diſcharged from the time of the ſhip's ſailing.—The inſured brought an action to recover back a part of the premium for the voyage *from Jamaica*.—At the trial, an uſage ſeemed to have been proved that when the ſhip was not out of the port of *Jamaica*, the allowance was one-half *per cent.* In other caſes it was arbitrary, and two or three *per cent.* was reaſonable. There was a verdict for the plaintiff.—Upon a motion for a new trial, the counſel differed as to the facts that were in evidence, and the cauſe was ſent back to a new trial, without the queſtion of law having been much diſcuſſed.—Lord *Manſfield*, however, ſaid, that where there is a *contingency* in the voyage, the riſk may be divided. That the reaſon why there are not two policies in ſuch caſes was, that the riſk "*at*," is capable of exact computation.

A ſhip inſured at and from *Jamaica* to *London*, warranted to ſail with convoy, arrives too late at the place of rendezvous for the convoy, but follows & overtakes them: Whether there ſhall be a return of premium.

Gale v. *Machell*, B. R. Eaſt. 25 G. III.

Where there is a contingency in the voyage, the riſk may be divided.

(*a*) Sup. 565.

computation. He ſaid the former caſes upon this point were contradictory.

In the ſame term in which this laſt caſe came before the court of King's Bench, the following caſe alſo came before that court: And though the judges there ſeem to have laid great ſtreſs on the uſage found by the jury, to return the premium, deducting one half *per cent.* upon inſurances, at and from *Jamaica*, with a warranty to depart with convoy, or to ſail on or before a certain day, and the warranty is not complied with; and though it is diſtinguiſhed from the caſe of *Meyer* v. *Gregſon* on this ground; yet it cannot be denied that the authority of the caſe of *Meyer* v. *Gregſon*, is greatly ſhaken by the caſe I allude to.

Goods are inſured "At and from *Jamaica* to *London*, warranted to depart with convoy before the 1ſt of *Auguſt*." The ſhip ſails before the day, but without convoy. There is an *uſage*, that in ſuch caſes the premium ſhall be returned, deducting ½ *per cent.* for the riſk *at.* The inſured ſhall recover the reſidue of his premium.

That was the caſe of an inſurance on goods, "At and "from *Jamaica* to *London*, warranted to depart with con- "voy, for the voyage, and to ſail on or before the firſt "of *Auguſt*, at a premium of 12 guineas *per cent.*"—The ſhip ſailed from *Jamaica* to *London* on the 31ſt of *July*, but without any convoy, whereby the underwriters became diſcharged from the remaining riſk.—An action was brought for a return of premium.—The jury found a verdict for the plaintiff ſubject to the opinion of the court on the above facts; in addition to which, they found 'that it was the conſtant and invariable uſage in 'inſurances, at and from *Jamaica* to *London*, *warranted* 'to depart with convoy, or, to ſail on or before a certain day, to 'return the premium, deducting one half *per cent.* if the 'ſhip ſailed without convoy, or after the day preſcribed.' —Upon this caſe, the court determined that the plaintiff was entitled to recover according to the uſage proved.—Lord *Mansfield* ſaid,—"The law is clear, that if the riſk be commenced, there ſhall be no return of premium. Hence queſtions ariſe of *diſtinct* riſks, inſured by one policy. My opinion has been to divide the riſks. I am aware that there are great difficulties in the way of apportionments, and therefore the court has always leaned againſt them. But where an expreſs uſage is found by the jury, the difficulty is cured."—Mr. Juſtice *Buller* ſaid;—"The counſel for the defendant did right to make the chief queſtion, whether any evidence of this uſage ought

Long v. *Allen*, B. R. Eaſt. 25 G. III. MS.

ought to have been received. In mercantile caſes, from Lord *Holt*'s time, and in policies of inſurance in particular, a great latitude of conſtruction, as to uſage, has been admitted. By uſage, places come within the policy, which are not within the words: Uſage explains, and even controls the policy. The uſage here found by the jury is univerſal; and though, in ſome caſes, one half *per cent.* is a ſmall premium for the riſk *at*; yet the underwriters are aware that it is ſo, and no inconvenience can reſult from it. In *Meyer* v. *Gregſon*, no uſage was found."

But if the riſk be entire, and be once commenced, it is a general rule that there ſhall be no return of premium. And the ſhortneſs of the time when the thing inſured was put in riſk affords no ground for a return of any part of the premium; which becomes the abſolute property of the inſurer, the moment the riſk commences, though it ſhould ceaſe the moment after. This is one of the favourable circumſtances which compenſate the inſurer for the accidents to which he is expoſed. It is impoſſible to apportion the premium to the duration of the riſk, which may be greater in the firſt hour than in the reſt of the voyage. (*a*) Therefore if the ſhip get under weigh and ſail on the voyage inſured, the premium is acquired, though ſhe return the ſame inſtant and wholly abandon the voyage. So if the ſhip deviate from the voyage inſured the next hour after ſhe ſails; though this diſcharges the inſurers, yet, the riſk having been commenced, there ſhall be no apportionment, or return of any part of the premium in reſpect of the diminution of the riſk.—The following caſe will ſhew that though the voyage be to ſeveral different places, and conſiſt of ſeveral different diſtinct parts; yet, if in fact it be *one entire riſk*, for *one entire premium*, and not ſeveral diſtinct riſks, there ſhall be no apportionment or return of the premium on account of any contingency which puts an end to the contract

But if the riſk be entire and be once commenced, there ſhall be no return.

(*a*) Vid *Emerig.* tom. 1, p. 62, 63. *Pothier*, h. t. n. 179.

contract before the commencement of any part of the voyage insured. (*a*)

A ship is insured "At and from *A.* to *B.* during her stay at *B.* and from thence to her port of discharge at *C.* and at and from *C.* back to *A.*" The ship is taken before she arrives at *C.* There shall be no return of premium for the voyage from *C.* to *A.* this being one entire risk and one voyage.

An insurance was made on a *French* ship and her cargo, "At and from *Honfleur* to the coast of *Angola*, during "her stay and trade there, at and from thence to her "port or ports of discharge in *St. Domingo*; and at and "from *St. Domingo* back to *Honfleur*; *at a premium of* "*eleven per cent.*"—The ship sailed to *Angola*, and from thence, after staying some time there, to the *West Indies*. On her way from *Angola*, she put into *Cayenne*, on the coast of *America*, and from thence went to *Martinico*, confessedly out of the course to *St. Domingo*, where the captain was obliged to dispose of his cargo. The ship sailed for *Honfleur*; but was taken by a privateer on her voyage thither. As the deviation discharged the underwriters from the loss, the only question was, whether there should be a return of part of the premium. On the part of the plaintiff it was contended, that the voyage insured consisted of three distinct parts or voyages; viz. from *Honfleur* to *Angola*, from *Angola* to *St. Domingo*, and from *St. Domingo* to *Honfleur*; and that, as this last voyage had never been commenced, the premium ought to be apportioned, and the part of it returned which was paid to insure the risk from *St. Domingo* to *Honfleur*.—But the jury, upon that point, were clear that there ought to be no return.—Lord *Mansfield*, who tried the cause, upon turning the question in his mind, entertained some doubts upon it, and desired that a new trial might be moved for upon that ground.—This being done, the court, upon great consideration, determined that this was one voyage, and one entire risk; and that there could be no return of premium.—Lord *Mansfield*, in delivering the opinion of the court on this point, said;—"On the fullest con-

Berman v. *Woodbridge*, *Doug.* 751.

(*a*) By the ordinance of *Louis* XIV. h. t. art. 6, if an insurance be made on the outward and homeward voyage, at an entire premium, and the ship arrive at her outward port of destination, but never returns, the insurer shall return one third of the premium.

conſideration, and after looking into all the caſes, (though my opinion has fluctuated,) we are now all clearly of opinion that there ought not to be any return. The queſtion depends upon this: Whether the policy be upon one entire riſk on one voyage, or whether it is to be ſplit into ſix different riſks; for by ſplitting the words, and taking *at*, and *from*, ſeparately, it will make ſix. The principles are clear. When the riſk has never begun, there muſt be a return of premium; and if the voyages in this caſe are diſtinct, the voyage from *St. Domingo* to *Honfleur* never began. On the other hand, if the riſk has once begun, you cannot ſever it, and apportion the premium. In an inſurance upon a life, with the common exception of *ſuicide and the hands of juſtice*; if the party commit ſuicide, or be executed in twenty-four hours, there ſhall be no return. The caſe is the ſame if a voyage inſured be once begun. Is this one entire riſk? The inſured and inſurers conſider the premium as an entire ſum for the whole, without diviſion.—It is eſtimated on the whole at eleven *per cent.* and which is extremely material, there is no where any contingency, at any period, out or home, mentioned in the policy, which happening, or not happening, is to put an end to the inſurance. The argument muſt be, that if the ſhip had been taken between *Honfleur* and *Angola*, there muſt have been a return. By an implied warranty, every ſhip muſt be ſea-worthy when ſhe ſails on the voyage inſured; but ſhe is not neceſſarily to continue ſo throughout the voyage; ſo that, if this be one entire voyage, if the ſhip was ſea-worthy when ſhe left *Honfleur*, the underwriters would have been liable though ſhe had not been ſo at *Angola*, &c. but according to the conſtruction contended for on the part of the plaintiff, ſhe muſt have been ſea-worthy, not only at her departure from *Honfleur*, but alſo when ſhe ſailed from *Angola*, and when ſhe ſailed from *St. Domingo*. The caſes of *Stevenſon* v. *Snow*, (*a*) and

The premium being entire, is a proof that the riſk is entire.

(*a*) Sup. 565.

and *Bond* v. *Nutt*, (*a*) were quite different from this. They depended on this, that there was a contingency ſpecified in the policy, upon the not happening of which the inſurance would ceaſe. In *Stevenſon* v. *Snow*, it depended on the contingency of the ſhip ſailing with convoy from *Portſmouth*, whether there ſhould be an inſurance from that place or not. This neceſſarily divided the riſk and made two voyages. In *Bond* v. *Nutt*, it was held that there were two riſks upon the ſame principle. "At *Jamaica*," was one. The other, viz. "From *Jamaica*," depended on the contingency of the ſhip having ſailed "*on or before the 1ſt of Auguſt.*" That was a condition precedent to the inſurance on the voyage *from Jamaica to London*. The two caſes of *Tyre* v. *Fletcher*, and *Loraine* v. *Thomlinſon*, are very ſtrong; for, if you could apportion the premium in any caſe, it would be in inſurances *on time*."

When the inſurance is for a *term*, and the premium is entire, if the riſk be begun, there ſhall be no return.

So, where the inſurance is for a term ſpecified in the policy, and for one entire premium; if the riſk be begun, and an event happen immediately after which determines the contract, there ſhall be no return of premium.

A ſhip, inſured for twelve months and warranted free from capture, is captured within two months. There ſhall be no return for the reſidue of the time.

Thus:—A ſhip was inſured, "At and from *London*, "to any port or place whereſoever or whatſoever, for "*twelve months*, from the 19th of *Auguſt* 1776, war-"ranted free from capture or ſeizure by the *Americans*." The premium was 9 l. *per cent.*—The ſhip was taken by an *American* privateer, about *two months* after ſhe ſailed. —The inſured brought an action to recover a proportion of the premium for the reſidue of the time.—The court determined that the riſk was *entire*; and, having been once begun, there could be no return of any part of the premium.—Lord *Manſfield* ſaid,—"This caſe is ſtript of every authority. There is no caſe, or practice, in point; and therefore we muſt argue from general principles applicable to policies of inſurance. And I take it, there are two general rules eſtabliſhed, applicable to this queſtion. The *firſt* is, that where the riſk has not been run,

Tyre v. *Fletcher*, *Cowp.* 666.

(*a*) Sup. 255.

run, whether this be owing to the fault, pleaſure, or will, of the inſured, or to any other cauſe, the premium ſhall be returned; becauſe a policy of inſurance is a contract of indemnity; the underwriter receives a premium for running the riſk of indemnifying the inſured; and, to whatever cauſe it be owing, if he does not run the riſk, the conſideration, for which the premium was put into his hands, fails, and therefore he ought to return it. Another rule is, that if the riſk has once commenced, there ſhall be no apportionment or return of premium afterwards: For though the premium is eſtimated, and the riſk depends upon the nature and length of the voyage; yet, if it was commenced, though it be only for 24 hours or leſs, the riſk is run; the contract is for the entire riſk; and no part of the conſideration ſhall be returned; and yet it is as eaſy to apportion for the length of the voyage, as it is for the time. If a ſhip had been inſured to the *Eaſt Indies*, agreeably to the terms of the policy in this caſe, and had been taken 24 hours after the riſk was begun, by an *American* captor, there is not a colour to ſay that there ſhould have been a return of premium. So much, then, is clear; and indeed perfectly agreeable to the ground of determination in *Stevenſon* v. *Snow*. (*a*) For, in that caſe, the intention of the parties, the nature of the contract, the conſequences of it, ſpoke manifeſtly *two* inſurances, and a *diviſion* between them. The firſt object of the inſurance was from *London* to *Halifax*: But if the ſhip did not depart from *Portſmouth* with the convoy ſpecified, then there was to be no contract from *Portſmouth* to *Halifax*. The parties, then, have ſaid, "We "make a contract from *London* to *Halifax*; but, on a cer- "tain contingency, it ſhall only be a contract from *Lon-* "*don* to *Portſmouth*." That contingency not happening, reduces it, in fact, to a contract from *London* to *Portſmouth* only. The whole argument turned upon that diſtinction, and all the judges, in delivering their opinion, lay the ſtreſs upon the contract compriſing *two diſtinct conditions*, and conſidering the voyage as being, in fact, *two*

(*a*) Sup. 565.

two voyages: And this was the equitable way of conſidering it; for though it was at firſt conſolidated by the parties, there was a defeaſance afterwards, though not in words. I think Mr. Juſtice *Wilmot* put it particularly on that ground; but that was the opinion of the court. There was an uſage alſo found by the jury in that caſe, that it was *cuſtomary* to return a proportionable part of the premium in ſuch caſes, but they could not ſay *what* part. The court rejected this, as a void *uſage*, for the uncertainty; but they argue from it, that there being ſuch a cuſtom, plainly ſhewed the general ſenſe of the merchants, as to the propriety of returning a part of the premium in ſuch caſes: And there can be no doubt of the reaſonableneſs of the thing. There has been an inſtance put where the meaſure is by *time*, which ſeems to me to be very ſtrong, and appoſite to the preſent caſe; and that is, an inſurance upon a man's life for twelve months: There can be no doubt but the riſk there is conſtituted by the meaſure of time, and depends entirely upon it; for the inſurer would demand double the premium for *two* years that he would take to inſure the ſame life for *one* year only. In ſuch policies there is a general exception againſt ſuicide.—If the perſon put an end to his life the next day, or a month after, or at any other period within the twelve months, there never was an idea that part of the premium ſhould be returned. A caſe of general practice was put by Mr. *Dunning*, where the words of the policy are, "At and from *provided* the ſhip "ſails on or before the 1ſt of *Auguſt*;" (*a*) and Mr. *Wallace* conſiders, in that caſe, that the whole policy would depend upon the ſhip's ſailing before the ſtated day. I do not

If a man's life be inſured for 12 months, with an exception of ſuicide, and he kill himſelf the next day; there ſhall be no return.

If an inſurance be '*at and from*,' *provided* the ſhip ſails on or before ſuch a day:—Whether this be two riſks, or only one entire riſk.

(*a*) It muſt be owned that the caſe thus put has much of ſubtlety in it. One part of it ſeems repugnant to the other. Mr. *Wallace* appears to have given it the beſt anſwer it would admit of. The word *provided* makes the ſailing on or before the firſt of *Auguſt* a *condition* upon which the contract is to take effect; and if this be ſo, the word "*at*" in the policy is quite nugatory.

not think ſo. On the contrary, I think, with Mr. *Dunning*, that cannot be. A loſs in port, *before* the day appointed for the ſhip's departure, can never be coupled with a contingency *after* the day: But if a queſtion were to ariſe about it, as at preſent adviſed, I ſhould incline to be of opinion, that it would fall within the reaſoning of *Stevenſon* v. *Snow*; and that there were two parts, or contracts, of inſurance, with diſtinct conditions: The *firſt* is, 'I inſure the ſhip in port, provided ſhe be loſt 'before the firſt of *Auguſt*:' And, *ſecondly*; 'If ſhe ſhould 'not be loſt in port, I inſure her then, during her voy-'age, from the firſt of *Auguſt*, till ſhe reach the port 'ſpecified in the policy.' The loſs in port muſt happen before the riſk upon the voyage could commence; and *vice verſa*, the riſk in port muſt ceaſe the moment the riſk upon the voyage began. (*a*)—Let us ſee, then, what the agreement of the parties is, in the preſent caſe. They might have inſured from two months to two months; or in any leſs or greater proportion, if they had thought proper ſo to do: But the fact is, that they have made no *diviſion of time* at all; but the contract entered into was one entire contract from the 19th of *Auguſt* 1776, to the 19th of *Auguſt* 1777; which is the ſame as if it had been expreſsly ſaid by the *inſured*; 'If you, the underwriter, 'will inſure me for 12 months, I will give you an entire 'ſum; but I will not have any apportionment.'—The ſhip ſails, and the underwriter runs the riſk for *two* months; no part of the premium, then, ſhall be returned.—I cannot ſay, if there had been a recapture before the expiration of the 12 months, that the policy would not have revived."

In the foregoing caſe Lord *Mansfield* intimated an opinion that where the premium is entire, it is one proof that

Even if the premium for a year be computed at *ſo much per month*, yet, being a groſs ſum, it is not a monthly inſurance.

(*a*) This extrajudicial opinion, ſeems to have been rather haſtily delivered, or perhaps, not very accurately reported. See the caſe of *Meyer* v. *Gregſon*, ſup. 567, which ſeems to be nearly the caſe put by Mr. *Dunning*, and in which Lord *Mansfield* and the reſt of the judges of the *King's Bench* decided that there ſhould be no return of premium.

that the risk is meant to be entire. In the following case, the court of *King's Bench* carried this idea still farther, and decided that if, upon an insurance for a year, a gross premium be given; but it is expressed in the policy to be *at so much per cent. per month*; this shall be deemed only a mode of computing the gross sum, and does not make the contract a monthly insurance.

A ship insured against *capture* for 12 months, is *lost in a storm* within two months. The premium is 9 *per cent.* and expressed in the policy to be at the rate of 15 s. *per month*; yet there shall be no return of premium.

Loraine v. *Thomlinson*, *Doug.* 564.

An insurance was made on a ship against capture only, *for twelve months*, in the coasting trade. The plaintiff underwrote 200 l. In the body of the policy it was stated, "That the insurers confessed themselves paid the "consideration due to them by the insured, *at and after* "*the rate of* 15 *s. per cent. per month.*" At the bottom opposite the plaintiff's subscription, was written, "Pre-"mium received the 15th of *March* 1779;" and on the back was indorsed,—"*Newcastle* 15th *March* 1779, Mr. "*J. G. Thomlinson*, on his ship *Chollerford*, himself "master, *for twelve months*, in the coasting trade, at and "between *Leith* and the *Isle of Wight*, beginning the "13th of *March* 1779, and ending the 12th of *March* "1780."—The premium was, in fact, not paid, it being the usage in *Newcastle* not to pay the premiums at the time of making insurances, but at certain times afterwards.—The ship was *lost in a storm* within the first two months; and the insured tendered the underwriter 3 l. as the premium for two months.—The underwriter brought his action against the insured to recover the whole premium of 18 l. The defendant pleaded the tender and paid the 3 l. into court.—The jury found a verdict for the plaintiff for the remaining 15 l. subject to the opinion of the court, whether he was entitled to his whole premium, or only to the 3 l. tendered, upon a case which, in substance, stated the above facts.—The court were clearly of opinion that the plaintiff was entitled to recover the whole premium.—Lord *Mansfield* said,—"This is a mere question of construction, on the face of the instrument, and therefore, parol evidence ought not to have been admitted to explain it. It is an insurance for 12 months, for one gross sum of 18 l. They have calculated this sum to be at the rate of 15 s. *per* month. But

But what was to be paid down? Not 15 s. for the firſt month, and ſo, from month to month; but 18 l. at once. Two caſes have been mentioned. *Stevenſon* v. *Snow*, (*a*) was decided on the ground of there being two voyages. *Tyrie* v. *Fletcher*, (*b*) is directly in point againſt the defendant." He then repeated the two rules laid down by himſelf in this laſt caſe.

Sect. 3.

Upon the Performance of ſome Stipulation.

If part of the premium is to be returned upon the performance of ſome ſtipulation, this ſhall be returned though the inſurer be obliged to pay a partial loſs.

IT is frequently agreed between the parties that, upon the happening of certain events, or the performance of certain ſtipulations, the inſurer ſhall return a part of the premium; and clauſes to this effect are often inſerted in the policy. If, in ſuch caſe, the event have happened, or the thing ſtipulated have been performed, the inſured ſhall be entitled to the return of premium agreed upon, even though the inſurer be obliged to pay a partial loſs.

Goods are inſured on any ſhip from *Grenada* to *London* at 18 guineas *per cent.* "to return 8 "*per cent.* if ſails "with convoy "and arrives" —The arrival of the *ſhip* is what is meant, and the ſhip having ſailed with convoy, the inſured is entitled to a return of 8 l. *per cent.* on the ſum inſured, notwithſtanding any partial loſs on the goods.

Thus:—An inſurance was made,—"At and from any "port or ports in *Grenada* to *London*, on any ſhip or ſhips "that ſhall ſail on or between the firſt of *May*, and the "firſt of *Auguſt* 1778, at 18 guineas *per cent. to return* "8 l. *per cent.* if ſails from any of the *Weſt India* iſlands, "with convoy for the voyage, and arrives." At the bottom of the policy there was written a declaration that it was on ſugars, (the muſcovado valued at 20 l. per hogſhead,) for account of L. Q.—The ſhip ſailed with convoy within the time limited, having 51 hogſheads of muſcovado ſugars on board belonging to L. Q. She arrived ſafe in the *Downs*, where the convoy left her as uſual. She afterwards ſtruck on a ſand bank near *Margate*, and 11 of the 51 caſks of ſugar were waſhed overboard, and the reſt damaged. The ſhip was afterwards got off, and arrived ſafe in the port of *London*. The ſugars ſaved were taken

[1] *Sirond* v. *Boydell*, *Doug.* 258.

(*a*) Sup. 565.—(*b*) Sup. 574.

taken out at *Margate*; and after undergoing a ſort of cure by a perſon ſent from town for that purpoſe, they were carried to *London* in other veſſels, and the 40 hogſheads being ſold, produced 340 l. inſtead of 800 l. their valuation in the policy. An action was brought againſt the underwriters for a return of premium.—The defendant paid into court 8 l. *per cent.* on 340 l. The plaintiffs inſiſted that they were entitled to have 8 l. *per cent.* alſo returned on the valued price of the 11 hogſheads of ſugar, which were loſt, and on the difference between what the remaining 40 hogſheads produced, and their valued price. —At the trial, before Lord *Mansfield*, the plaintiffs had a verdict for their whole demand.—Upon a motion for a new trial the principal queſtion was upon the effect of the word "*arrives.*"—For the plaintiffs it was inſiſted that this word related only to the arrival of the *ſhip*. That, in policies of this ſort, the intention is, that the underwriters ſhall take the war riſk upon themſelves; but that, if the veſſel be protected by convoy from *that riſk*, and actually arrives, they ſhall then return as much of the premium as was neceſſary to cover it.—On the other ſide, it was contended, that as the words of the policy muſt be applied to the ſubject matter of the inſurance, which in this caſe was on the goods, not on the ſhip, the return of premium could, at moſt, be only on the value of the ſugars which actually came to *London*; whereas, if the defendant muſt pay the valued amount of the ſugars loſt, and the difference between the valued price and the actual produce of the ſugars ſaved, and alſo return 8 l. *per cent.* upon the whole, the inſured would be conſiderable gainers by the loſs.—The court determined that the arrival of the *ſhip* was what was meant by the policy; and that the plaintiff was entitled to a return of full 8 l. *per cent.* on the ſum inſured, notwithſtanding the partial loſs on the goods.—Lord *Mansfield*, after obſerving how very inattentive thoſe who introduce additional clauſes into policies are to their import, ſaid;—I do not doubt, however, how we are to conſtrue this policy. Dangers of the ſea are the ſame in peace and war: But war introduces hazards of another ſort, depending on a variety

Why it is ſometimes provided that a part of the premium ſhall be returned in caſe the ſhip fails with convoy.

of

of circumſtances; ſome known, others not, for which an additional premium muſt be paid. Thoſe hazards are diminiſhed by the protection of convoy; and if the inſured will warrant a departure with convoy, there is a diminution of the additional premium. If the inſured will not warrant a departure with convoy, he pays the full premium; and in that caſe, the underwriter ſays: "If it turn out that the ſhip do depart with con-"voy, I will return part of the premium." But a ſhip may ſail with convoy and be ſeparated from it by a ſtorm, or other accident, in a day or two, and loſe its protection. On a warranty to ſail with convoy, that would not be a breach of the condition: But, to guard againſt that, the inſured adds, in policies of the preſent ſort; "The "ſhip muſt not only ſail with convoy, but ſhe muſt *arrive*, "to entitle you to the return." The words, "*and ar-*"*rives*," do not mean that the ſhip ſhall arrive in the company of the convoy; but only that ſhe herſelf ſhall arrive. If ſhe do, that ſhews, either that ſhe had convoy the whole way, or did not want it. But, in the ſtipulation for the return of premium, no regard is had by the parties to the condition of the goods, on the arrival of the ſhip. The conſtruction contended for by the defendant is *adding a comment longer than the text.* If it had been meant that no return ſhould be made, unleſs all the goods arrived ſafe, they would have ſaid; "If the ſhip arrive "*with all the goods*, or, *ſafely with all the goods.*" The total or partial loſs of the goods was the ſubject of the *indemnity*, and muſt be paid for by the underwriter. But, as to the return of the additional premium; whether the goods arrive ſafe or not, makes no part of the queſtion. The ſingle principle which governs is, that, in the events that have happened, the war riſk has been rated too high."

The words "*and arrives*" in the policy only mean that the *ſhip*, not the goods, ſhall arrive.

So, where an inſurance was made on the freight of the ſhip *Jackſon*, "At and from *Jamaica* to *London*, war-"ranted to ſail on or before the 26th of *July* 1796, with "convoy for the voyage, at the rate of 10 guineas *per cent.* "*to*

The inſurer on freight agrees to return part of the premium "if the ſhip ſails with convoy and *arrives*."——The ſhip having ſai-

led with convoy and arrived, the insured shall have the return, though the ship being captured and recaptured, the underwriters were obliged to pay salvage.

Aguilar and others v. *Rodgers*, 7 T. R. 421.

"*to return* 2 l. *per cent.* if she sailed on or before the "1st of *July* 1796, and arrived."—Afterwards, by a memorandum indorsed on the policy, 15th *August* 1796, and signed by the underwriters, it was agreed, in consideration of 10 guineas *per cent.* additional premium, that the warranty of sailing with convoy should be annulled, and the defendant undertook to return 10 l. *per cent.* "*if the ship sailed with convoy and arrived.*" The ship sailed from *Jamaica* on the 26th of *July*, with convoy, but separated in bad weather, and was captured on the 26th of *October*, recaptured on the 5th of *November*, and carried into *Cork*, where she was delivered up to the owners, on paying 9 l. 14 s. 7 d. *per cent.* for salvage. She afterwards arrived at the port of *London* with her cargo.—In an action on the policy, with counts for a return of premium, the defendant paid into court 19 l. 9 s. 2 d. the amount of the salvage on 200 l. his subscription.—The plaintiffs obtained a verdict for the premium, and, upon a motion to set it aside, the court determined that according to the true construction of the memorandum, the insured in this case was entitled to the return of premium there stipulated.—Lord *Kenyon* said,—"I agree with the defendant's counsel, that every arrival of the ship at her port of destination, would not be an arrival within the fair construction of the memorandum; such, for instance, as an arrival in the possession of an enemy at a neutral port; or an arrival at her port in *England*, as the property of other persons after a capture. But, in order to satisfy the memorandum, it should be an arrival at the destined port, *in the course of the voyage*; and, in this case, the ship did arrive at the port of *London*, in the course of her voyage. It is now too late to controvert the authority of *Hamilton* v. *Mendez*, even if we were disposed so to do, which I am not, where it was holden that though the insured may abandon, on hearing of a capture, yet if they do not abandon, and the ship be afterwards recaptured, it must be considered as if she had never been out of the possession of the owners. It is 18 years since the case of *Simond* v. *Boydell* (*a*) was decided.

(*a*) Sup. 579.

decided. That caſe muſt be well known in the commercial world; and if the parties in this caſe had intended to make an agreement different from that which the words uſed in this memorandum import, they would have added, after "*arrived*," the words "*ſafely from the* "*enemy*" or ſome others to that effect. But the words here uſed are not equivocal, and we ought not to depart from them. It would be attended with great miſchief and inconvenience if, in conſtruing contracts of this kind, we were not to decide according to the words uſed by the contracting parties. On the grammatical conſtruction of the words, which is the ſafeſt rule to go by, I am of opinion that the verdict ought not to be ſet aſide."

A ſhip is inſured at 12 guineas *per cent.* to return 6 l. if ſhe ſail with convoy from the coaſt of *Portugal* and arrive. She ſails under convoy from *Oporto* for *Liſbon*, where the whole trade bound for *England* were to rendezvous, in order to ſail together from thence. The ſhips going from *Oporto* to *Liſbon* being diſperſed in a gale of wind, the ſhip inſured ran for *England* and arrived.—It was determined that this ſailing with convoy from *Oporto* for *Liſbon* was a ſailing with convoy from the coaſt of *Portugal*, ſo as to entitle the inſured to 6 l. *per cent.* return of premium.

If the inſured be entitled to a return of premium in caſe the ſhip ſail with convoy from the coaſt of *Portugal* and arrive; he will be entitled to this, if the ſhip ſail with convoy from *Oporto* for *Liſbon*, to join another convoy there.

Audley v. *Duff*, 2 *Pul.* & *Bof.* 11. Sup. 289.

Sect. 4.

Of the Deduction of one-half per Cent. upon a Return of Premium.

AS the inſurer can never, by his own act, diſcharge himſelf from the contract, it ſeems but reaſonable that, where the inſured thinks proper to put a ſtop to the adventure, and prevent the riſk from ever commencing, he

(*a*) Sup. 579.

he ſhould make ſome compenſation to the inſurer for his trouble and diſappointment; it is therefore the general cuſtom in all the maritime contries of *Europe*, to allow him to retain one-half *per cent.* (*a*)—This the *French* denominate *droit de ſignature*. *Pothier* (*b*) thinks it is given to compenſate the inſurer for the loſs he ſuſtains by the non-performance of the contract, by the act of the inſured. *Emerigon* (*c*) ſays it is for his trouble in ſigning the policy, and making the proper entry in his books; and this is the reaſon given in *Le Guidon.* (*d*)

It is allowed to the inſurers where the contract is void for ſome radical defect, provided this was unknown to him when he entered into the contract. (*e*) But if he was informed of the fault, or muſt have known it before he ſubſcribed the policy; as if he were to inſure a ſhip or goods when he knew of their ſafe arrival, or ſeamen's wages, or contraband goods, knowing them to be ſuch, he could have no claim to this allowance.(*f*)

Pothier holds that if the contract become void, not by the act of the inſured, but by ſome cauſe which he could not prevent or control, the inſurer ſhall not be entitled to the half *per cent.* (*g*)—*Emerigon*, on the contrary, maintains that in all caſes where the policy becomes void, without any fraud on the part of the inſurer, he ſhall have this allowance. (*h*)

(*a*) *Molloy*, b. 2, c. 7, § 12.—(*b*) h. t. n. 181.—(*c*) Tom. 2, p. 168.—(*d*) Ch. 2, art. 16.—(*e*) Ord. of *Antwerp*, art. 14, 2 *Mag.* 27.—(*f*) *Valin* on art. 10, 16, 17, h. t. *Pothier*, h. t. n. 183, *Emerig.* tom. 2, p. 169.—(*g*) *Pothier*, h. t. n. 181.—(*h*) *Emerig.* tom. 2, p. 169. Vid. *Le Guidon*, ch. 2, art. 16, ord. of *Amſt.* art. 22, ord. of *Antwerp*, art. 16, 2 *Mag.* 27, 28.

CHAP.

CHAP. XVII.

Of the Proceedings in Actions on Policies of Insurance.

IN treating of actions on policies of insurance we will inquire,

1. In what courts they may be brought;
2. Of the declaration;
3. Of the plea, and bringing money into court;
4. Of the consolidation rule;
5. Of the trial.

Sect. 1.

In what Courts Actions on Policies of Insurance may be brought.

The courts of common law have the sole jurisdiction in matters of insurance.

INSURANCE being a marine contract, the law which regulates it, is considered, in most of the commercial states of *Europe*, as a branch of marine law, and therefore, where no commercial tribunal is established, questions arising upon this contract, generally belong to the jurisdiction of the courts of admiralty. (*a*) But I do not find that courts of admiralty have ever had jurisdiction in questions of insurance in this country. (*b*) In a former part of this work (*c*) I took occasion to observe, that although the modes of administering justice in our courts of common law, are so well suited to the investigation and decision of all commercial questions; yet, that it was not till towards the end of Queen *Elizabeth*'s reign, that actions upon policies of insurance began to be brought in the courts of *Westminster*; and that the legislature, even then, conceiving that questions upon this contract ought not to be litigated in those courts, being governed by certain

(*a*) Vid. *Emerig.* t. 2, p. 319.—(*b*) For this consult *Zouch* on the jurisdiction of the admiralty.—(*c*) Sup. 24.

tain rules unknown to the common law, erected a court for the ſole purpoſe of determining ſuch cauſes; but that, though the powers of this court were greatly enlarged in a ſubſequent reign, yet, it ſoon fell into diſuſe, and the determination of all queſtions ariſing out of this contract has long ſince excluſively belonged to the courts of common law.

Courts of equity have no juriſdiction in caſes of inſurance

Courts of equity have no more juriſdiction in caſes of inſurance than in thoſe of the pureſt common law cognizance. They do, indeed, ſometimes, in caſes of inſurance, as in all other caſes, interpoſe their authority for the advancement of juſtice. That court will compel a truſtee to permit his name to be uſed by the *cetui que truſt* in an action on a policy of inſurance; (*a*) it will iſſue commiſſions for the examination of witneſſes reſiding abroad, or out of the juriſdiction of the court, and grant injunctions to ſtay the proceedings at law till the return of ſuch commiſſions; (*b*) it will compel a party charged with fraud to make a full diſcovery upon oath of all circumſtances within his knowledge which may lead to a diſcovery of the real facts of the caſe; and deliver up, or permit an inſpection of, all papers and documents which are material to the matters in diſpute.—But, except in ſuch caſes, it has been ſolemnly determined, that courts of equity have no juriſdiction in queſtions of inſurance. (*c*)

The parties cannot, by agreement to ſubmit their differences to arbitration, ouſt the ſupreme courts of their juriſdiction.

It may be proper, in this place, to mention, that the authority of the ſupreme courts of *Weſtminſter* is ſo tranſcendent, that nothing but the expreſs words of an act of Parliament can take away or abridge their juriſdiction in any caſe; (*d*) and therefore a clauſe inſerted in a policy, that, in caſe of any diſpute between the parties, it ſhall be referred to arbitration, is merely nugatory, for without

(*a*) Per Lord *Hardwicke*, Ch. 1 *Atk.* 457.—(*b*) R. *Chitty* v. *Selwin*, 2 *Atk.* 359.—(*c*) R. upon demurrer in Chancery, and confirmed in the Houſe of Lords upon appeal, *De Ghetoff* v. *Lond. Aſſur.* 3 *Bro.* Parl. Ca. 525; Per Lord *Hardwicke*, Ch. 1 *Atk.* 457.—(*d*) 2 *Hawk.* P. C. 286, 2 *Bur.* 1042.

without it, the parties may, if they think proper, ſubmit their differences to arbitration; and with it, neither can *compel* the other to do ſo; for the agreement of the parties cannot ouſt the ſupreme courts of their juriſdiction. (*a*) If, indeed, an award be actually made, it will be a bar to an action; or if the parties have ſubmitted their differences to arbitration, and the reference be ſtill depending, that, perhaps, may alſo be a bar. (*b*)

Sect. 2.

Of the Declaration.

Special *aſſumpſit* is the proper form of action againſt private underwriters.

THE common policy of inſurance, ſubſcribed by private underwriters, being only a written undertaking, not under ſeal, is but a ſimple contract, and therefore aſſumpſit is the proper form of action to be brought upon it, againſt the underwriters. And as the action in ſuch caſe is founded on a particular and expreſs undertaking made upon a conſideration, upon which the law would not, by neceſſary implication, raiſe the promiſe ſpecified in the policy, the plaintiff muſt declare ſpecially upon it.

Heads of the declaration.

In this, like every other caſe of ſpecial *aſſumpſit*, the contract muſt be ſet forth with preciſion; for any material variance or omiſſion will be fatal. (*c*)—The declaration muſt therefore recite the policy, (which is alleged to have been made according to the cuſtom of merchants,) with ſuch warranties and ſtipulations as may have been introduced into it, with an averment that the defendant had notice of the policy.—It then alleges, that in conſideration that the plaintiff had paid his premium to the defendant, and had promiſed to perform all things on his part to be done, the defendant promiſed to become an inſurer for the ſum ſubſcribed by him, upon the terms mentioned in the policy, and that he

(*a*) R. *Kill* v. *Holliſter*, 1 *Wilſ.* 129.—(*b*) Per Cur. 1 *Wilſ.* 129, ſed Q.—(*c*) Vid. *Gilb.* law of evid. 193.

he would perform all things, on his part, as to that ſum; and alſo that he had ſubſcribed the policy as an inſurer for that ſum. That the inſured was, at the time of the inſurance, and at the time of the loſs, intereſted in the ſhip or goods inſured, to the amount of the value in the policy, if it be a valued one, or to the amount of the ſums ſubſcribed, if it be an open one. —It then ſtates that the ſhip, &c. on a certain day was in good ſafety at her port of departure; that ſhe ſailed on the voyage inſured within the time mentioned in the policy, if a time be limited for her ſailing; and with convoy, if there be a warranty for her ſo doing;—and it likewiſe avers an exact compliance with every other warranty expreſſed in the policy.—The *loſs* is then ſtated, which muſt appear to have been occaſioned by ſome of the perils inſured againſt; and this muſt be ſhewn with reaſonable certainty, that the inſurer may have notice of the caſe againſt which he is to prepare his defence.—Notice to the defendant of this loſs, and a demand of the ſum ſubſcribed by him are then averred. And laſtly, the breach of the contract by the non-payment of the ſum ſubſcribed by the defendant.

This is the general outline of a declaration upon a common policy, ſubſcribed by individual underwriters in an ordinary caſe. When there are any particular circumſtances, it behoves the plaintiff to be careful to adapt his declaration to them.—It is uſual to add a count for money had and received by the defendant to the plaintiff's uſe, to enable the plaintiff to recover back his premium, if, under all the circumſtances, he ſhould appear to be entitled to that only.

Count for money had and received.

When a loſs has been adjuſted, and the adjuſtment ſigned by the inſurer in the uſual manner, the inſured, in order to recover this loſs, is not obliged to declare ſpecially upon the adjuſtment as upon a new contract; but may declare upon the policy in the uſual manner, and give the adjuſtment in evidence, which, as we formerly obſerved, (*a*) is equivalent to an admiſſion, though

It is not neceſſary to declare ſpecially upon an adjuſtment. The inſured may give it in evidence upon the uſual declaration upon the policy.

(*a*) Sup. 542.

though not concluſive, of all the facts neceſſary to be proved, to entitle the inſured to recover upon the policy. (*a*)

The averment of intereſt may be either general or ſpecial.

The *averment of intereſt* in the inſured may be either general or ſpecial. Under a general averment of intereſt the plaintiff may give in evidence any intereſt he may have in the thing inſured. But if the intereſt be averred ſpecially, it muſt be proved as ſtated. The general averment is, therefore, in moſt caſes, to be preferred. Nor can I ſee any neceſſity for a ſpecial averment, unleſs the queſtion of intereſt be the only matter in diſpute between the parties, and the plaintiff means to put this upon the record. (*b*)

But the general averment is ſufficient not only as to the *title*, but alſo as to the *quantum* of intereſt.

The general averment is ſufficient, not only as to the *title* or *claim* of the inſured, but alſo as to the *quantum of intereſt*. In aſſumpſit the plaintiff recovers damages according to the evidence, *pro tanto*; and, therefore, if he aver intereſt generally, in the entire thing inſured, he ſhall recover for the loſs in proportion to the *quantum* of intereſt he proves. (*c*)

If the inſurance be in the name of an agent, it muſt be averred for whoſe uſe.

If the inſurance be made in the name of an agent, the action may be brought either in his name or in the name of the principal; and in either caſe it muſt be averred that the policy was made in the name of the agent, as agent, for the uſe of the principal, who is averred to have been intereſted in the ſhip or goods inſured, to the amount of the ſum inſured, or the value in the policy.

In averring the intereſt, it is ſufficient to ſhew it to have been in thoſe who had the property at the time of making the inſurance.

In averring intereſt in the inſured, it is ſufficient to ſhew it to have been in thoſe who had the property *at the time of making the policy*.—Therefore, where it was averred in the declaration, that *P. Maingy* and *N. Maingy*, until,

(*a*) Per Lord *Kenyon*, at N. P. *Rodgers* v. *Maylor*, ſup. 544.—(*b*) See the caſe of *Crawford* v. *Hunter*, ſup. 85, where the intereſt was ſpecially averred, probably to bring the queſtion of intereſt, which, in that caſe, was a mere queſtion of law, to an immediate deciſion upon demurrer.—(*c*) R. *Riſing* v. *Burnet*, inf.

Perchard v. *Whitmore*, at N. P. after *Mich.* 1786. 2 *Pul.* and *Bof.* 155 n.

until, and *at the time of making the policy*, and alſo at the time of the loſs, were intereſted in the goods mentioned in the policy; and that the ſaid inſurance was made for the ſaid *P. M.* and *N. M.*, and for their account. In the courſe of the cauſe it appeared that Mr. *Le Meſurier* had, ſince the policy was effected, become a partner with *P. M.* and *N. M.*, and had taken a ſhare of all the ſtock, *including the goods inſured.* Upon this it was urged on the part of the defendant, that the plaintiff ſhould be nonſuited; for as Mr. *Le M.* was intereſted in the goods inſured, the averment of intereſt in the declaration was diſproved.—But Mr. Juſtice *Buller*, who tried the cauſe, ſaid, he thought the plaintiff ought not to be *nonſuited*; for that Mr. *Le M.* was not intereſted *at the time of making the policy*, to which the averment of intereſt related, and the plaintiff brought the action for thoſe who were intereſted at the time.

In this caſe it ſeems to have been taken for granted, that if Mr. *Le M.* had been a part owner at the time the policy was effected, the plaintiff muſt have been nonſuited. Yet the following caſe ſhews that, even in that caſe, the averment would be ſufficiently ſupported by the evidence.

A cargo is purchaſed by *A.* who parts with a ſhare in it to *B.*, and afterwards inſures it on his own account; *A.* may aver intereſt in himſelf alone. The fact of *B.*'s having been let into a ſhare in the adventure, does not negative the averment, *A.* having ſtill an intereſt in the entirety of the cargo.

A policy was effected on a cargo of corn by the plaintiff, as agent to Meſſrs. *Hyde* and *Hobbs*.—In the declaration on this policy, it was averred that *Hyde* and *Hobbs* were, at the time of loading the ſaid corn on board the ſaid ſhip, and at the time of ſubſcribing the policy, and alſo at the time of the loſs, intereſted in the ſaid corn, *to the amount of all the money inſured thereon*, and that the ſaid policy ſo made in the name of the plaintiff, was made for the uſe, riſk, benefit, and account of the ſaid *Hyde* and *Hobbs*.—Upon the trial before Lord *Eldon*, it appeared that after *Hyde* and *Hobbs* had purchaſed the corn on their own account, they, thinking the engagement might be too large for them, offered another houſe a ſhare in the corn, which was accepted: *Hyde* and *Hobbs* having informed the plaintiff of this, directed him to effect the inſurance on the cargo. *Hyde* and

Page v. *Fry*, 2 *Pul.* & *Bof.* 240.

and *Hobbs* paid for the cargo, and invoices were made out to them.—It was objected, on the part of the defendant, that this evidence negatived the averment in the declaration, that the whole intereſt was in *Hyde* and *Hobbs*.—Lord *Eldon*, however, directed a verdict for the plaintiff, with liberty to the defendant to move to enter a nonſuit.—Upon that motion, the court were clearly of opinion that *Hyde* and *Hobbs* had an intereſt in the *entirety* of the cargo, ſufficient to ſupport the averment in the declaration, notwithſtanding other perſons had a beneficial intereſt in part.

Whether it be neceſſary to aver intereſt in a caſe not prohibited by the 19 G. II. c. 37.

It has been holden (*a*) that before the ſtat. 19 G. II. c. 37, inſurances without intereſt were not illegal; and that, before that act, it was unneceſſary to aver intereſt in the inſured in any caſe, and conſequently that ever ſince that act, it is not neceſſary to aver intereſt in any caſe not prohibited by it.

Commiſſioners for the care of foreign ſhips and goods ſeized by the King, may inſure in their own names, and declare on their own intereſt.

Therefore, where commiſſioners, appointed under the ſtat. 35 G. III. c. 8, § 21, were authorized to take into their poſſeſſion and care all *Dutch* ſhips and effects brought into, or detained in the ports of *Great Britain*, and to diſpoſe thereof according to ſuch directions as they might receive from the privy council; it was determined that theſe commiſſioners might inſure, in their own names, the ſhips and effects thus put under their care, while they were on their paſſage to this country; and that a count ſtating the nature of their truſt, and averring an intereſt in them, as ſuch commiſſioners, was good. In the ſame caſe it was alſo determined, that a count averring that the ſhips inſured did not, at the time when the inſurance was effected, *belong to his Majeſty or any of his ſubjects*, was likewiſe good, without any averment of intereſt. (*b*)

The loſs muſt be averred to have ariſen from the true cauſe, and no other.

As the fact of the loſs is often the principal matter in diſpute, it is neceſſary to ſtate the true cauſe of it, with reaſonable certainty, that it may appear to be a loſs within the policy, and for which the defendant is liable; and

(*a*) Sup. 103.—(*b*) R. *Craufurd* v. *Hunter*, 8 T. R. 13, ſup. 85.

and alſo, that he may have notice of the caſe which he is called upon to anſwer.—Therefore, if, in a declaration upon a policy without intereſt, the loſs be averred to have been occaſioned by *capture*, when, in fact, the ſhip was releaſed from the capture, and might have proceeded on her voyage; the inſured cannot recover; for the ſhip might have reached her deſtined port, which was the event inſured.—Had it been a policy *upon intereſt*, the inſured might have abandoned, and then the averment of a loſs by capture would have been good.

A ſhip inſured, intereſt or no intereſt, is captured, but afterwards ſet at liberty in a condition to purſue the voyage inſured; but inſtead of that, ſails on a different voyage, and is loſt. The inſured cannot recover as for a loſs by capture.

Kulen Kemp v. *Vigne*, 1 T. R. 304. ſup. 106.

Therefore where goods were inſured on board the ſhip *Emanuel*, at and from *Falmouth* to *Marſeilles*, *intereſt or no intereſt*, warranted a *Daniſh* ſhip.—In declaring on this policy it was averred that, "Whilſt the ſhip was proceeding in her voyage from *Falmouth* to *Marſeilles*, and before ſhe could arrive at *Marſeilles*, ſhe was captured by the *Spaniards*; and thereby the ſaid ſhip, and alſo the goods and merchandizes on board her, were totally loſt to the plaintiffs."—Upon the trial it appeared, that the ſhip was taken by a *Spaniſh* privateer and carried into *Ceuta*, where ſhe was condemned, but, upon appeal, was afterwards releaſed, and in a condition to purſue her voyage; but inſtead of proceeding to *Marſeilles*, which ſhe might have done, ſhe firſt ſailed to *Malaga* to refit, and from thence ſhe went on a voyage to *Bremen*, and in that voyage was loſt.—On the trial it was objected, on the part of the defendant, that the plaintiffs could not recover upon this form of declaring, for a loſs by *capture*; for though the veſſel was captured, yet having afterwards been reſtored, ſhe might have reached her deſtined port, in which caſe the underwriters would have been diſcharged by the terms of the memorandum; that if this had been a policy upon *intereſt*, the averment that the ſhip was loſt by capture would have been good; becauſe, in that caſe, the inſured might have *abandoned*: But this being a wager policy, and the event inſured againſt being the non-arrival of the ſhip at *Marſeilles*, the inſured could not abandon. (*a*)—Mr. Juſtice *Buller*, who tried

(*a*) Vid. *Fitzgerald* v. *Pole*, 5 *Bro.* Parl. Ca. 131. Sup. 504.

tried the cauſe, being of this opinion, nonſuited the plaintiffs.—Upon a motion to ſet aſide this nonſuit, it was contended on the part of the plaintiffs, that the object of the voyage was defeated by the capture; that the moment the voyage was defeated, the inſurers became liable, and after that, it was immaterial what courſe the ſhip took.—But the court adopted the ſame opinion, upon which Mr. Juſtice *Buller* had nonſuited the plaintiffs, and held that this could not be averred to be a loſs by *capture*; becauſe, after the capture, the ſhip might ſtill have proceeded to *Marſeilles*, which was the event inſured.

If rioters board a ſhip and occaſion a *ſtranding*, the loſs cannot be recovered on a count for *detention of people*, or for a loſs by *pirates*, but only upon a count for a loſs by *ſtranding*.

So, if a mob of rioters board a ſhip, for the purpoſe of obliging the captain to ſell a cargo of corn at an inferior price; and in conſequence of this boarding, the ſhip be ſtranded, and a quantity of the corn loſt: This is a loſs by *ſtranding*, within the uſual memorandum, and, in an action on a policy on the corn, it muſt be ſo laid in the declaration; nor could the inſured recover in this caſe, upon a count for a loſs by *detention of people*; becauſe this mob did not conſtitute *a people* within the meaning of the policy: Neither could the inſured recover for a loſs by *pirates*; becauſe, this being a policy on *corn*, the inſurer was liable for no partial loſs, unleſs it were a *general average*, or the ſhip were ſtranded; and this was not a general average, becauſe the whole adventure was never in jeopardy; for the perſons who took the corn intended no injury to the ſhip, or any part of the cargo but the corn.

Neſbitt v. *Luſhington*, 4 T. R. 723, ſup. 147, 436.

If a loſs happen in conſequence of the captain's miſtake, this cannot be declared upon, as for a loſs by the perils of the ſea.

The cauſe of the loſs muſt be ſtated according to the truth of the caſe. The defendant has a right to inſiſt upon this, in order that he may have an opportunity of demurring, or moving in arreſt of judgment, if it be not ſufficiently averred. If, therefore, a loſs happen in conſequence of the captain's miſtaking his courſe, and in the declaration it be alleged that it aroſe from *the perils of the ſea, contrary winds, and other misfortunes*; the plaintiff cannot recover.

Thus:

The captain of a ſlave ſhip miſtakes his courſe, whereby a ſcarcity of water enſues, and a number of the ſlaves are thrown overboard to ſave the reſt: It is not ſufficient to ſtate in the declaration that, *by contrary winds, currents, &c.* the ſhip was retarded, and the ſlaves periſhed for want of water.

Greyſon v. *Gilbert*, B. R. 23 G. III. *Park*, 62.

Thus: —In a declaration on a policy *on ſlaves* it was ſtated,—"That, by the *perils of the ſea, contrary winds, currents,* "*and other misfortunes*, the voyage was ſo much retarded, "that a ſufficient quantity of water did not remain for the "ſupport of the ſlaves and other people on board, and that "a certain number of the ſlaves *periſhed for want of water.*" —Upon the trial it appeared that the ſhip, being bound from *Guinea* to *Jamaica*, had miſſed the iſland, and that the crew were reduced to great diſtreſs for want of water: That the captain conſulted with the crew, and it was unanimouſly agreed upon, that ſome of the ſlaves ſhould be thrown overboard, in order to preſerve the reſt; and that, at the time this reſolution was formed, there remained but one day's full allowance of water, at two quarts *per* man. The jury, upon this evidence, found a verdict for the plaintiff, with 30 l. a-head for every ſlave thrown overboard.—The court, upon a motion, granted a new trial, being of opinion that the declaration did not ſtate the loſs according to the truth of the caſe.—Lord *Mansfield* ſaid,—"This is a very uncommon caſe, and deſerves further conſideration. There is great weight in the objection, that the loſs is ſtated in the declaration to have ariſen from the *perils of the ſea*, and that the currents, &c. had made the ſhip foul and leaky. Now, does it appear by the evidence that the ſhip was foul or leaky? On the contrary, the loſs happened by miſtaking *Jamaica* for another place."—Mr. Juſtice *Buller* ſaid;—"The declaration does not, in any part of it, ſtate the loſs which has been the occaſion of this demand; and it would be very miſchievous if we were to overturn this objection. Suppoſe, for a moment, that the underwriters, in ſome caſes, are liable for the *miſtake* of the captain; yet, if they are not liable in others, the nature of the loſs muſt be ſtated in the declaration, that the defendant may have an opportunity of moving in arreſt of judgment, if it be not ſufficiently alleged. But it would be impoſſible for the defendant, in this caſe, to move in arreſt of judgment; for the facts of the caſe, as proved, are different from thoſe ſtated in the declaration. The point of law in arreſt of judgment cannot be argued from the

the facts ſtated on the record; and the declaration in this caſe ſtates the loſs to have happened by the perils of the ſea."

In ſtating the cauſe of the loſs, the beſt way is to allege it, as nearly as may be, in the words of the policy: As if the loſs be by *barratry*, it ought regularly to be ſtated to have been occaſioned "*by the barratry of* "*the maſter and mariners.*" But it will be ſufficient if it be ſtated in words which import the ſame thing.

But the loſs need not be ſtated in the very words of the policy.

Thus, where it was alleged that, *per fraudem et negligentiam magiſtri, navis prædicta depreſſa et ſubmerſa fuit, et totalitur perdita et amiſſa fuit, et nullius valoris devenit*:— It was objected that this was not within the meaning of the word *barratry*, and that the allegation ſhould have been expreſs, that the ſhip was loſt by the barratry of the maſter; and that, though barratry may import *fraud*, yet it does not import *neglect*.—But the court were unanimouſly of opinion that there was no occaſion to aver the fact, *in the very words of the policy*; but if the fact alleged came within the *meaning of the words*, it was ſufficient.

If the declaration allege the loſs to have happened by the *fraud and negligence* of the maſter; this is a ſufficient allegation of *barratry*.

Knight v. *Cambridge*, 2 Ld. *Ray.* 1349; 1 Str. 581, ſup. 312.

Where ſalvage is to be recovered, it is not neceſſary to declare for ſalvage, *eo nomine*. It is ſufficient to ſtate the accident or injury which occaſioned that charge, without ſtating ſpecially the particular circumſtances which led to it.

Where ſalvage is to be recovered, it is ſufficient to ſtate the injury which occaſioned it.

Thus:—The plaintiff declared, "that the ſhip "*ſprung a leak and ſunk* in the river, whereby the goods "inſured were ſpoiled:"—The evidence was, that ſome of the goods were ſpoiled, and ſome ſaved; and the queſtion was, whether the plaintiff might give in evidence the expenſe of *ſalvage*, that not being particularly laid in the declaration as a breach of the policy.—Lord *Hardwicke*, C. J. ſaid,—"I think it may be given in evidence; for the inſurance is againſt all accidents. The accident laid in the declaration is, that the ſhip ſunk in the river; it goes on and ſays, that, by reaſon thereof, the goods were ſpoiled, which is the only ſpecial damage laid: Yet it is but the common caſe of a declaration

Carey v. *King*, Ca. Temp. *Hard.* 304.

tion that lays ſpecial damage, when the plaintiff may give evidence of any damage that is within the cauſe of action as laid; and though it was objected that ſuch a breach of the policy ſhould be laid, as that the inſurer may have notice to defend it; it is ſo in this caſe, for they have laid the accident, which is ſufficient."

Only debt or covenant will lie on the policies of the two inſurance companies.

The two inſurance companies being corporations can do no act but by deed under their common ſeals. Their policies of inſurance, therefore, being under ſeal, no action of *aſſumpſit* will lie upon them, but only debt or covenant.

The 6 G. I. c. 18. preſcribes a form of declaring in debt.

By the ſtat. 6 *G.* I. c. 18. § 4, each of theſe companies is directed to provide ſuch a ſtock of ready money as ſhall be ſufficient to anſwer all juſt demands upon their policies for any loſſes that may happen, and to pay the ſame from time to time, according to the tenor of their policies: 'And in caſe of refuſal, the inſured may 'bring his action of *debt*, or *on the caſe*, (*a*) bill, ſuit, or 'information for the money demanded, againſt the cor- 'poration refuſing to pay as aforeſaid, in any of his Maj- 'eſty's courts of record at *Weſtminſter*.—And in ſuch 'action the plaintiff may declare, "*That the ſame cor-* "*poration is indebted to him in the money ſo demanded, and* "*have not paid the ſame according to this act;*" and 'thereupon the plaintiff or plaintiffs ſhall recover againſt 'the ſame corporation double damages beſides full coſts 'of ſuit.'

This laſt clauſe abſurdly ſubjected theſe companies to double damages, beſides coſts, in actions which they could not prevent or avoid, for want of a proviſion in the act to oblige the inſured to make diſcovery of his loſs before action brought. This being found to encourage ſuits for the ſake of double damages was ſoon repealed by a clauſe

(*a*) This act muſt have been drawn by ſome perſon very little ſkilled in legal forms. An action *on the caſe* is here given on their policies *under ſeal*; and this is followed by a form of declaring in *debt*.

a clauſe in a ſubſequent ſtatute. Theſe corporations are now, therefore, only liable to pay their loſſes in the ſame manner as private underwriters. (*a*)

If the venue in the declaration be laid in a wrong county, the court, upon motion, will change it to the county where the policy was made, (*b*) unleſs it be by *deed*; in which caſe the court will not change the venue, without ſome ſpecial ground being laid to induce them to depart from the general rule. (*c*)

The venue may be changed if wrong laid, unleſs it be by deed.

If the inſured ſeek only to recover back his premium, the proper form of action is *indebitatus aſſumpſit*, for money had and received by the defendant to the uſe of the plaintiff.

The premium may be recovered back in an action for money had and received.

Sect. 3.

Of the Plea, and bringing Money into Court.

THE moſt uſual plea to an action on a policy of inſurance is the general iſſue, *non aſſumpſit*; which not only puts in iſſue every fact alleged in the declaration, but alſo enables the defendant to give in evidence any matter that goes to diſaffirm the contract, or to diſcharge the plaintiff's demand under it. (*d*)—If, therefore, the defendant would diſpute the legality or the validity of the policy; if he would deny the intereſt of the inſured, and ſhew the policy to have been a wagering one; if he would prove that the inſured has been guilty of miſrepreſentation, concealment, or any other fraud; that the ſhip was not ſea-worthy; that the voyage inſured was not the voyage intended; that the ſhip ſailed on

In what caſes the general iſſue is the proper plea.

(*a*) Vid. ſtat. 8 *G.* I. ch. 30, § 25.—(*b*) And. 66, 2 Str. 1180, Say. Rep. 7, 2 T. R. 275.—(*c*) 1 T. R. 781.—(*d*) *Doug.* 106, 7. Vid. *Bul.* N. P. 152.

on a different voyage from that deſcribed in the policy; that there had been a deviation; that no loſs, or at leaſt not to the amount claimed by the plaintiff, had happened,—the general iſſue is the proper plea. (*a*)

Under the general iſſue, the defendant may ſhew non-performance of a warranty.

Though the compliance with every warranty expreſſed in the policy, or implied in the contract, is an affirmative which it is incumbent on the plaintiff to prove; yet, in anſwer to the general evidence by which ſuch compliance is often proved, the defendant may, under the general iſſue, prove a non-compliance: As, that the ſhip did not ſail with convoy; that ſhe never obtained ſailing inſtructions, or had unneceſſarily quitted the convoy; that ſhe was enemy's property, though warranted neutral; that ſhe had forfeited her neutrality, &c.

Or that the inſurance was double.

So the defendant may ſhew that it was a double inſurance, and that the plaintiff had already recovered to the amount of his intereſt againſt the underwriters in another

(*a*) In the caſe of *Goram* v. *Sweeting*, (2 *Saund.* 205,) the defendant, to a declaration for a total loſs by the perils of the ſea, pleaded that the ſhip arrived ſafe; "*abſque hoc*, that "the ſhip, her tackle, apparel, and furniture, were ſunk in the "ſea and loſt."—Upon demurrer to this plea, it was objected that the traverſe being in the conjunctive, if iſſue had been taken on it, and ſo much as an anchor or cable had been ſaved, the defendant would have been entitled to a verdict, though every thing elſe had been loſt.—The court gave judgment for the plaintiff.—*Saunders*, who was counſel for the defendant, and probably drew the plea, concludes his report in much diſpleaſure at the judgment of the court, who, he ſays, *decided without much conſideration, or well underſtanding the caſe.* The plea was one of thoſe artful expedients to gain an unfair advantage, in which the bar, in *Saunders*'s time, was very fertile. Special pleas in aſſumpſit are now quite exploded. The plea of *non aſſumpſit*, which puts in iſſue every material allegation in the declaration, and under which the defendant may prove whatever ſhews that, *ex æquo et bono*, the plaintiff has no right to recover, is now the only plea ever pleaded in actions on policies of inſurance, which are meant to be tried upon the merits only.

another policy, to whom the defendant has made contribution. (*a*)

To enable the defendant to diſcover whether there be a double inſurance in any caſe, he may, under the ſtat. 19 *G.* II. c. 37, § 6, call upon the plaintiff to declare in writing, within 15 days, what ſums he has inſured in the whole, and how much he has borrowed on bottomry or reſpondentia, for the voyage in queſtion or any part of it. (*b*)—It is a little ſingular, however, that this act provides no means of compelling the plaintiff to deliver this declaration, nor any puniſhment for delivering a falſe one. The court would, probably, after the expiration of the 15 days, ſtay the proceedings till a ſatisfactory declaration were delivered. An action would, perhaps, lie at the ſuit of the inſurer againſt the inſured, either for refuſing to make ſuch declaration, or for delivering a falſe one. (*c*)

By ſtat. 19 *G.* II. c. 37, the inſured muſt diſcloſe how much he has inſured in the whole.

Where the queſtion between the parties is, not whether the underwriters be liable to pay any thing to the inſured, but only *how much* they ſhall pay, it will be adviſable for them to *tender*, before any action brought, the ſum which, under all the circumſtances, they conceive to be fully ſufficient to ſatisfy every fair claim of the inſured. When ſuch tender has been made and rejected, it may be pleaded, with non aſſumpſit as to the reſidue of the plaintiff's demand.—The plaintiff, by his replication, may either deny the tender, or confeſs it, and join iſſue on the plea of *non aſſumpſit* as to the reſidue, and upon that iſſue proceed to trial for further damages.—When the underwriter, in ſuch caſe, has omitted to make a tender before proceſs has been ſued out againſt him, he ſhould *bring the money into court*. (*d*)—Before the ſtat. 19 *G.* II. c. 37, it would ſeem that this was not permitted in actions on policies of inſurance; and yet, in *aſſumpſit*, and covenant for the payment of money, and in debt alſo, even where the plaintiff might have recovered leſs than the ſum demanded,

When the defendant may plead a tender.

When he ſhall bring money into court.

(*a*) Vid. ſup. ch. 4, § 4.—(*b*) Vid. ſup. 121.—(*c*) Vid. 2 Inſt. 74, 104. F. N. B. 161.—(*d*) Vid. ſup. ch. 16, § 1.

manded, this practice had been allowed long before. (*a*) But now the above act (§ 7.) provides, 'that in debt, 'covenant, or any other action on any policy of insur-'ance, the defendant may bring into court any sum or 'sums of money; and if the plaintiff shall refuse to ac-'cept the same, with costs to be taxed, in full discharge 'of such action; and shall afterwards proceed to trial, 'and the jury shall not assess damages exceeding the mon-'eybrought into court; the plaintiff shall pay the defen-'dantin such action, the costs to be taxed.'

Whether alien enemy ought to be pleaded or given in evidence under the general issue.

It has been already shewn that no action can be maintained on any policy of insurance on the property of an *alien enemy*, either at his own suit, or on his behalf. (*b*) If, therefore, an action on a policy be meant to be defended on that ground, it may be specially pleaded in bar, being matter of law which does not go to the git of the action, but only to the *discharge* of it. (*c*)—From the report of the judgment, delivered by Lord *Kenyon* in the case of *Brandon* v. *Nesbitt*, it would seem that, in his lordship's opinion, this is merely a temporary disability, which only lasts to the end of the war. This is unquestionably true, when the insurance has been effected before the commencement of the war; because the contract would then be clearly legal, and the remedy only suspended. But whether this would be the case, if the contract were made during the war, is not quite so clear. (*d*)

The two insurance companies may, to *debt*, plead *nil debet*, and to covenant, *non infregit conventionem*; and the jury may give the whole, or such part of the sum insured, as the plaintiff is entitled to recover.

As to the two insurance companies, though the clause of the stat. 6 *G.* I. c. 18. § 4. which gave double damages against them, was repealed by the stat. 8 *G.* I. c. 30. § 25.; yet the form of the policy remained, and it was still necessary to sue them either in debt or covenant; from whence this inconvenience arose, that these

(*a*) 5 Mod. 212, 1 *Vent.* 356, 2 *Salk.* 596, 7. 1 Lord *Ray.* 255.—(*b*) Vid. sup. ch. 2, § 1.—(*c*) In the case of *Brandon* v. *Nesbitt*, 6 T. R. 23, sup. 36. it was pleaded; but in *Bristow* v. *Towers*, 6 T. R. 35, sup. 37. the defendant pleaded the general issue, and the fact was found by the special verdict.—(*d*) Vid. sup. ch. 2, § 1.

theſe companies, when ſued, were obliged to plead ſpecially; (*a*) becauſe the general iſſue, *non eſt factum*, only puts in iſſue the exiſtence of the inſtrument upon which the plaintiff declares. (*b*) The conſequence muſt have been, that the parties were often entangled in the intricacies of pleading; and even when an iſſue was at length joined, it frequently happened that the whole merits could not come in queſtion, and the jury were obliged to find a verdict for the whole ſum inſured, though in juſtice only a ſmall part of it was due. This drove the defendants to ſeek relief in courts of equity, when the matter in queſtion might as well have been determined at once by the jury, in like manner as in the caſe of private inſurers.(*c*)—To remedy this inconvenience, the ſtat. 11 *G.* I. ch. 30. § 43. provides,—'That in all actions of debt 'againſt either of the ſaid corporations, upon any po'licies of inſurance under their common ſeal, it ſhall be 'lawful for them to plead generally *that they owed nothing* 'to the plaintiff in ſuch action; and in actions of cov'enant upon ſuch policies, to plead generally, *that they* '*have not broke the covenants* in ſuch policy contained, or 'any of them. And if iſſue be joined thereupon, it ſhall 'be lawful for the jury, if they ſee cauſe, to find a 'verdict for the plaintiff, and to give ſuch part only of 'the ſum demanded, if in debt, or ſo much damages, 'if

(*a*) If the form of declaring mentioned in the ſtat. 6 *G.* I. c. 18. § 4. (which does not mention or even refer to the policy,) had been adopted in actions againſt theſe companies, the inconveniences here enumerated might have been avoided; becauſe, to ſuch a declaration the defendant might have pleaded *nil debet*, and upon that plea the parties might have gone to trial upon the merits, whatever thoſe merits might have been, in like manner as upon the general iſſue in an action of *aſſumpſit* upon a common policy. But, unfortunately, plaintiffs were not *compelled* by the ſtatute to adopt the form of declaration therein given; and they, or at leaſt their attornies, were too much intereſted to purſue a different courſe.—(*b*) 5 Co. 119. —(*c*) Vid. recital to the ſtat. 11 *G.* I. c. 30. § 43.

'if in covenant, as it ſhall appear to them, upon the evi-
'dence, ſuch plaintiff ought in juſtice to have.'

Sect. 4.

Of the Conſolidation Rule.

The neceſſity of conſolidating actions on policies of inſurance.

WE have already ſeen that the underwriters on common policies only bind themſelves *ſeverally*, that is, each for the amount of his own ſubſcription, and not jointly; becauſe it would be impoſſible to find any number of underwriters who would be willing to bind themſelves for each other, as they muſt do if the contract were *joint*; and, indeed, ſince the eſtabliſhment of the inſurance companies, ſuch a policy would be void by the ſtat. 6 G. I. c. 18. (*a*) Hence the inſured, even if he were ſo diſpoſed, cannot bring a joint action againſt all the underwriters on a common policy, but muſt ſeek his remedy by a ſeparate action againſt each. This, though it neceſſarily reſults from the form of the contract, was a ſubject of complaint ſo long ago as the time of Queen *Elizabeth* (*b*); and it cannot be denied that it enabled the inſured, if his demand were diſputed or delayed, to proceed to trial in all the actions, however ſmall his demand might be againſt each underwriter, and thus ſubject each to the entire coſts of an action. They therefore often found it to be the wiſer policy, rather to ſubmit to an unjuſt demand, than ſubject themſelves to ſuch heavy charges. Sometimes, indeed, they ſought relief in courts of equity, which granted injunctions to ſtay the proceedings in all the actions but one, the defendants in the reſt undertaking to pay, according to their ſubſcriptions, if the plaintiff ſhould recover in that one.

This was formerly done by courts of equity.

This

(*a*) Sup. 41.—(*b*) Vid. the preamble to ſtat. 43 *Eliz.* c. 12, ſup. 24.

This being found to be very inconvenient, and little leſs expenſive than the oppreſſive proceeding againſt which the underwriters ſought relief, an attempt was at length made by Mr. Serjeant *Eyres*, in the year 1731, in a caſe where 28 actions had been brought on a policy, to ſtay the proceedings in all but one, the defendants in the reſt entering into a rule of court that thoſe cauſes ſhould abide the event of that one. But the plaintiff refuſing to give up his advantage and conſent to ſuch a rule, the court declared they could do nothing in it. (*a*) —It has been ſaid (*b*) that "Mr. Juſtice *Deniſon* intimated, that if the plaintiff perſiſted againſt his own intereſt, in his right to try all the cauſes, the court had the power of granting imparlances in all but one, till there ſhould be an opportunity of trying that one action; that Lord *Mansfield* then ſtated the great advantage reſulting to each party by conſenting to the application which was made; and added that, if the plaintiff conſented to ſuch a rule, the defendant ſhould undertake not to file any bill in equity for delay, nor to bring any writ of error, and ſhould produce all books and papers that were material to the point in iſſue; and that this rule was afterwards conſented to by the plaintiff."—It is not preciſely ſtated when, or upon what occaſion, this paſſed. From the manner in which it is introduced, it would ſeem as if it had paſſed in the above caſe of —— v. *Glover*. But neither Mr. Juſtice *Deniſon* or Lord *Mansfield* was a judge till many years after that caſe. It is extremely probable that after Lord *Mansfield* came to preſide in the court of King's Bench, he and Mr. Juſtice *Deniſon* did, upon ſome occaſion, expreſs ſentiments ſimilar to thoſe aſcribed to them; becauſe it is well known that Lord *Mansfield*, ſoon after his coming into that court, firſt eſtabliſhed the conſolidation rule, and ſettled the practice upon it in its preſent form. It is ſingular, however, that Sir *James Burrow*, who has reported

First attempt to do this in a court of law.

(*a*) Vid. —— v. *Glover*, Hil. 5 *G.* II, 2 *Barnardiſt.* 103. —(*b*) *Park* introd. p. 50.

reported the deciſions of the court of King's Bench for many years after Lord *Mansfield* came to preſide there, has publiſhed no report of the caſe in which ſo important an alteration of the practice firſt took place.

The nature of the rule, and the terms on which it is uſually made.

Be this as it may, it is now the conſtant practice, where a number of actions are brought upon the ſame policy, to conſolidate them by a rule of court, which reſtrains the plaintiff from proceeding to trial in more than one, and binds the defendants in all the others to abide the event of that one. But this is done upon condition that the defendant ſhall not file any bill in equity, or bring any writ of error, for delay.

Mutual admiſſions.

But beſide theſe, the court, upon a proper ground being made by the plaintiff, will impoſe any other terms upon the defendants, which, under all the circumſtances, appear reaſonable: As, that they ſhall produce at the trial, all books, papers, &c. in their cuſtody, material to the point in iſſue; that the defendant in the action to be tried ſhall admit his ſubſcription to the policy, the intereſt of the inſured, the loſs, or any other fact, upon which the queſtion intended to be tried does not turn, or which is not meant to be ſeriouſly diſputed. But the court will not impoſe any terms on the defendant out of the ordinary courſe, without his conſent, which, however, a defendant, who only means to litigate fairly and honourably, will never refuſe, when it is only to ſave the trouble and expenſe of proving facts which are not diſputed. On the other hand, the court, in conſideration of theſe unuſual conceſſions, will impoſe any reaſonable counter-terms on the plaintiff, which the defendant may have to propoſe.

It is never made a part of the rule that the plaintiff may try the other cauſes if he pleaſe.

It is no part of the conſolidation rule that the plaintiff ſhall be at liberty to try the other cauſes if he pleaſe. Such a liberty would defeat the end propoſed by the conſolidation rule; and, therefore, if the plaintiff will not conſent to the rule without this term, the court will grant imparlances in all the cauſes but one till he conſents. (*a*)

Thus

(*a*) Per Cur. *Brown* v. *Newnham*, E. 25 *G.* III. B. R. MS.

Thus has a practice, which was often attended with ruinous conſequences to the one party or the other, at length, by the wiſdom of the judges, been converted into an effectual means of obtaining ſubſtantial juſtice for both, at a moderate expenſe, in caſes where the obſtinacy or diſhoneſty of plaintiffs might, before this regulation took place, have rendered that almoſt impoſſible. —On the one hand, the court may ſtay the plaintiff's proceedings for any length of time, if, through perverſeneſs or the cunning of his illiberal adviſers, he refuſe his conſent to conſolidate the actions upon proper terms. If, on the other, the defendants will not accede to ſuch terms, the court, to puniſh them, may permit all the actions to proceed.

Benefits reſulting from this rule.

But though, by the rule, the defendants undertake to be bound by a verdict in the action which is to be tried; yet, this muſt be underſtood to mean ſuch a verdict as ought to ſtand, as a final determination of the cauſe. It is certainly very beneficial to the parties that there ſhould be but one trial for all the underwriters on the policy; but then that trial ſhould be a ſatisfactory one. (*a*) And therefore, if the plaintiff obtain a verdict; but the defendant apply for and obtain a new trial, the other defendants ſhall not be obliged to pay their money till the ultimate deciſion of the cauſe in favour of the plaintiff. (*b*) And in caſes of inſurance, therefore, the courts ſhould, in general, be leſs ſtrict, and ſometimes grant new trials upon leſs deciſive grounds, than in other caſes.

All the defendants are bound by the verdict in the cauſe tried; but that ought to be a ſatisfactory one.

By the terms of the conſolidation rule, the defendants are bound *generally* not to bring *any writ of error*; the meaning of which is, that, after a fair trial, and ſubſtantial juſtice has been done, no writ of error ſhall be brought, though manifeſt error appear on the face of the record. For even then, the writ of error being againſt the juſtice of the caſe, the court will hold the party

If an attorney ſue out a writ of error, tho' for manifeſt error, this will be a breach of the rule.

(*a*) Per Lord *Manſfield*, 1 *Bl.* 464.—(*b*) R. *Hodgſon* v. *Richardſon*, 3 *Bur.* 1477.

party ſtrictly to the terms of the rule by which the plaintiff has been prevented from proceeding in the ordinary courſe of law. If, therefore, under ſuch circumſtances, the defendant's attorney bring a writ of error, the court will grant an attachment againſt him for his contempt in ſuch a breach of the rule. (*a*)

Sect. 5.

Of the Trial.

Proof of the plaintiff's caſe.

IF the parties proceed to trial upon the general *iſſue*, which moſt frequently happens, the plaintiff, as has been already obſerved, muſt, as in all other caſes, begin by proving every material allegation contained in his declaration.—If any of the facts of the caſe, on either ſide, have been agreed to be admitted, theſe admiſſions are reduced into writing and ſigned by the attornies on both ſides, and being read, they ſupply the place of actual proof.

The neceſſity of mutual admiſſions.

In every litigation upon commercial ſubjects, and particularly in matters of inſurance, it is highly proper, nay in ſome caſes abſolutely neceſſary, that the parties ſhould mutually admit every fact that is not meant to be ſeriouſly diſputed, in order that the caſe may be put upon its true merits with as little expenſe, vexation, or delay as poſſible. Commercial liberality and profeſſional honour both equally require that this ſpecies of candour ſhould be carried as far as the fair and juſt pretenſions of the parties will admit. Nothing can more conduce to the ends of juſtice, nothing can more exalt the national character, or promote the true intereſts of commerce, than ſuch mutual conceſſions.

The rules of evidence are, in general, the ſame in trials upon policies of inſurance as in other caſes. There are only two caſes to be found in our books upon points of evidence which may be thought peculiar to inſurance. The

(*a*) R. *Camden* v. *Edie*, 1 *H. Bl.* 21.

The firſt is a very ſhort note, in which it is ſaid to have been determined that, in an action on a policy of inſurance, any who have inſured upon the ſame ſhip cannot be witneſſes.—Mr. Juſtice *Buller*, from whoſe book the above note is cited, in delivering his judgment in the following caſe of *Bent* v. *Baker*, ſays, that he took great pains but without ſucceſs, to get the real ſtatement of that caſe, thinking that it might have been determined on its own particular circumſtances. "However," ſays he, "in conſequence of that determination, judges at *niſi prius* have frequently rejected underwriters as witneſſes. Nor is it extraordinary that at *niſi prius* they ſhould have been guided by the only caſe upon the ſubject, without much examination into the grounds of it."

In general an underwriter cannot be a witneſs in an action on a policy.

Ridout v. *Johnſon*, E. 11 *An.* *Bul.* N. P. 284.

In the other caſe, which was ſolemnly determined upon great conſideration, one *Bowden*, the broker who had effected the policy, was produced as a witneſs on behalf of the defendant. It appeared that *Bowden* had ſubſcribed the ſame policy, immediately after the other underwriters; that an action was then depending againſt him for the ſame loſs; and that he and the other underwriters had filed a bill in equity againſt the inſured for a diſcovery, in order to avoid the policy.—It was objected on the part of the plaintiffs, that he was not a competent witneſs for the defendant. Upon this the defendant produced a releaſe to *Bowden* of all demands for any contribution of coſts both in law and equity, and the coſts of the ſuit in equity were tendered to the plaintiffs, with an undertaking to diſmiſs their bill, which the plaintiffs refuſed.—The witneſs was rejected by Lord *Loughborough*, and this queſtion coming before the court of King's Bench upon a bill of exceptions, it was there determined that, under the circumſtances, *Bowden* was a competent witneſs for the defendant, and that his teſtimony ought to have been received.—Lord *Kenyon* founded his opinion on the ground that the witneſs was not intereſted.—Mr. Juſtice *Aſhurſt* thought that, as he had acted as broker, he could not afterwards, by ſubſcribing the policy, or by any other act of his own, deprive

But if the broker who effects a policy, ſubſcribe it himſelf, after the other underwriters have ſubſcribed it;—he may be a witneſs for the other underwriters, if they releaſe him from all contribution for coſts, though an action be depending againſt him and he has joined in a bill in equity againſt the inſured, for a diſcovery.

Bent v. *Baker*, 3 T. R. 27.

prive either party of his teſtimony.—Mr. Juſtice *Buller* was of opinion, that if the witneſs was competent to anſwer *any* queſtion, he ought not to have been rejected *generally;* and that, on the principle of neceſſity alone, he ought to have been received; as he might be the only perſon who, from the nature of the thing, could ſpeak to a repreſentation, for inſtance, made by himſelf to the underwriters.

This caſe affords a ſufficient proof, that brokers and others, who act as agents, either for the inſured or the inſurers, ought never to be underwriters. (*a*)

The evidence generally adduced on the part of the plaintiff is reducible to the following heads;

1. Proof of the contract;
2. ——— payment of the premium;
3. ——— the intereſt of the inſured;
4. ——— the performance of warranties;
5. ——— the loſs.

1. *Proof of the Contract.*

The policy being proved, is concluſive evidence of the contract; and no parol evidence can be received to vary the terms of it.

The firſt ſtep on the part of the plaintiff is to prove the contract, which is done by producing the policy and proving the defendant's ſubſcription to it. This, if there be no variance, is concluſive evidence of the contract ſtated in the declaration; and no evidence can be received of any parol ſtipulation or agreement to alter, control, or qualify it.

A parol agreement that the riſk was to begin at a place different from that inſerted in the policy, cannot be received in evidence.

Thus, where an inſurance was made "From *Archangel* "to *Leghorn;*" and at a trial at bar, the defendant endeavoured to ſet up a parol agreement, made before the ſubſcription, that the adventure ſhould only begin from the *Downs*:—It was objected, that unleſs ſuch agreement be put in writing, it ſhall be taken that the policy ſpeaks the

Kaines v. *Knightly, Skin.* 454.

(*a*) Vid. ſup. 209.

the minds of the parties; and to ſuffer policies to be defeated by agreements not in writing, would be to leſſen their credit, and render them of no value.—Lord C. J. *Pemberton* ſaid, that policies were ſacred things; and that a merchant ſhould no more be allowed to go from what he had ſubſcribed in them, than he that ſubſcribes a bill of exchange, payable at ſuch a day, ſhall be allowed to ſay that it was agreed to be upon a condition, &c. when the bill may have been negociated: For though neither of them is a ſpecialty, yet they are of great credit, and much for the ſupport, convenience, and advantage of trade.—The jury, however, found contrary to the direction of the court. But this verdict was ſet aſide; and upon another trial at bar, the next term, there was a verdict for the plaintiff, according to the direction of the court.

Witneſſes may be examined, however, to prove an *uſage*, as explanatory of a clauſe in a policy; but their *opinion of its meaning* is not admiſſible evidence. (*a*) Queſtions of conſtruction are queſtions of law, which the judges only are competent to determine; and the opinion of no other perſon, whatever may be his ability or experience, can ever be looked upon as of authority in our courts, or received in evidence before a jury.

Witneſſes may prove an *uſage* as explanatory of a clauſe in the policy; but their *opinions* are not admiſſible. How far the uſage of trade to be attended to.

With reſpect to *uſage*, it is a ſort of natural law, formed out of our habits, our intereſts, and the univerſal conſent of mankind. In all maritime affairs, it is regarded as the ſureſt interpreter of the law. There the maxim, *Optima eſt legum interpres conſuetudo*, particularly applies. In queſtions of inſurance, eſtabliſhed uſages muſt in all caſes be adhered to; and in doubtful caſes, they are the ſafeſt guide we can follow. If the uſage of trade in any inſtance be not ſufficiently known or rightly underſtood, it is adviſable to conſult the moſt experienced merchants.—Still, however, the power of uſage is not to deſtroy the law. Uſage is to be

How far the *uſage of trade* ought to be regarded.

(*a*) Per Lord *Mansfield*, in *Lyons* v. *Bridge*, *Doug.* 512. Vid. alſo Lord *Mansfield's* judgment in *Carter* v. *Boehm*, ſup. 347.

be conſulted only where the law is doubtful. Where the law is clear, it muſt prevail. The law is permanent; but uſages ſometimes change, and often diſappear with the circumſtances which gave them birth.

How the procuration ſhall be proved where a policy is ſubſcribed by an agent in the name of his principal.

Policies are often ſubſcribed by an agent in the name of the underwriter, and in ſtrictneſs, the procuration or authority of the agent, thus to ſubſcribe for his principal, ought to be proved. Few defendants, however, would ever think of availing themſelves of the want of ſuch proof in an action which ought never to be tried but upon ſome point fairly diſputable. An inſtance, however, occurs where the attempt was made.

Neale v. *Erving*, Eſp. Rep. 61.

In an action on a policy, the broker was called to prove the ſubſcription. He ſaid that the defendant's name had been ſubſcribed by one *Hutchins*; he did not know by what authority, but that *Hutchins* was in the conſtant habit of ſubſcribing policies in the defendant's name, and had done ſeveral for him and for others to his knowledge. —It was objected that *Hutchins* might have done this by a power of attorney, which might have been limited, or for a particular purpoſe; and therefore ſhould have been ſhewn, that it might appear that *Hutchins* was properly authoriſed.—But Lord *Kenyon* overruled the objection, being of opinion that the acts of *Hutchins* held him out to the world as properly authoriſed; and his having ſubſcribed ſeveral policies in the defendant's name, was ſufficient evidence of that authority to charge the defendant: That if *Hutchins* was only a particular agent for the defendant, it lay on him to ſhew it, not the plaintiff.

2. *Proof of Payment of the Premium.*

Proof of the policy is proof of the payment of the premium.

Every policy contains a clauſe by which the underwriters confeſs themſelves to have been paid by the inſured the conſideration for the inſurance, after the rate of

ſo

ſo much *per cent.*; and the policy being proved, is therefore evidence of the premium's having been paid.

Policies are, in general, effected by the intervention of brokers, between whom and the underwriters open accounts are uſually kept, in which the brokers make themſelves debtors for all premiums, and take credit for all loſſes which they are authoriſed to receive from the underwriters; and theſe accounts are ſettled and adjuſted at ſtated periods. In general, therefore the underwriter looks to the broker only for his premium. It often, indeed, happens that the underwriter knows not who the inſured is; and as he gives the inſured a receipt for the premium upon the face of the policy, it muſt be ſuppoſed that, having thus diſcharged him, if the premium be left unpaid, he gives credit only to the broker, and from him only can he recover it. (*a*)

3. *Proof of the Intereſt of the Inſured.*

How the intereſt ſhall be proved.

The next thing to be proved is the *intereſt* of the inſured. (*b*) This may be done by any documents which are evidence of the property which the inſured has in the ſhip or goods inſured, and of the value of that property; ſuch as bills of ſale, bills of lading, invoices, and proof that the goods were on board, (*c*) bills of charges of the out-fit, cuſtom houſe clearances, &c.; and any deficiency in this ſpecies of proof may be ſupplied by parol evidence. So, if the inſured has exerciſed acts of ownerſhip, by directing the loading, &c. of the ſhip, it has been holden that proof of the payment of the people employed, was ſufficient proof of intereſt in the ſhip. (*d*)

The rules of evidence in ſuch caſes, where no fraud is ſuſpected, are not very rigidly adhered to:—Therefore where

(*a*) Vid. ſup. 203.—(*b*) As to what ſhall amount to an inſurable intereſt, vid. ſup. ch. 4, paſſim.—(*c*) Per Lord *Kenyon*, in *Mc Andrew* v. *Bell*, at N. P. *Eſp.* N. P. Rep. 373, ſup. 350.—(*d*) Per Lord *Kenyon*, at N. P. *Amery* v. *Rogers*, *Eſp.* N. P. Rep. 209, ſup. 531.

A bill of parcels with the vendor's receipt for goods bought abroad is ſufficient proof of intereſt.

Ruſſel v. *Beebm*, 2 *Str.* 1127.

where an action was brought upon a policy of inſurance on a cargo of goods purchaſed at *Peterſburgh*; the plaintiff, in order to prove his intereſt, produced a *bill of parcels* from the vendor at *Peterſburgh*, with his receipt to it, and proved his hand-writing. The defendant objected that this was no evidence againſt the underwriters: But Lord C. J. *Lee*, who tried the cauſe, held it to be ſufficient evidence of the plaintiff's intereſt.

Upon a general averment of intereſt the inſured may prove any ſpecies of intereſt that is deemed inſurable in any *aliquot part* of the thing inſured.

In the ſecond ſection of this chapter (*a*) it has been ſhewn that in the declaration the intereſt may be averred either generally or ſpecially; and that, under a general averment of intereſt, the inſured may prove any ſpecies of intereſt he may have in the ſhip or goods inſured. It is alſo there ſhewn that it is unneceſſary to ſtate the *quantum* of the intereſt in the declaration; for as the plaintiff in aſſumpſit recovers according to the evidence *pro tanto*, he may under a general averment of intereſt in the entire thing inſured, prove an intereſt in any *aliquot part*, and recover damages for the loſs in proportion to ſuch part.

Upon a *valued policy*, it is only neceſſary to prove *ſome* intereſt.

If the policy be an *open* one, the real value of the plaintiff's intereſt muſt be proved: If it be a *valued* one, it has been holden that the inſured needs only to prove *ſome* intereſt, to take the caſe out of the ſtat. 19 *G.* II. c. 37; becauſe the underwriter, by ſubſcribing the policy, has admitted the value there ſtated; and if more were required, the agreed valuation would ſignify nothing. (*b*)

Yet the value in the policy is only *primâ facie* evidence, and may be diſputed.

And yet the value in the policy is only to be taken as *primâ facie* evidence of the amount of the intereſt of the inſured. For though this value is admitted by the inſurer; yet, as he admits it upon the mere repreſentation of the inſured, if he find it to be fallacious, and that the ſpecified value was fictitious, and only a cover for a wager, it cannot be ſuppoſed that he is ſo far concluded by his admiſſion, as not to be at liberty to diſpute the value, and ſhew by evidence, that it was meant as a mere evaſion of the act. (*c*)

In

(*a*) Sup. 589.—(*b*) Per Lord *Manſfield*, in *Lewis* v. *Rucker*, 2 *Bur.* 1171, ſup. 535.—(*c*) Vid. ſup. 199.

In an action upon a policy *on goods*, the plaintiff cannot give in evidence a *reſpondentia bond*, as proof of *intereſt* in the goods upon which the money was borrowed, though they were of greater value than the ſum inſured; becauſe bottomry and reſpondentia intereſts are always inſured *as ſuch*, and there is no inſtance of an inſurance on reſpondentia under the denomination of goods. (*a*)—Where money has been lent on reſpondentia on *Eaſt India* voyages, the ſtat. 19 *G.* II. c. 37, § 5, conſiders the borrower as having a right to inſure only for the ſurplus value of the goods, above the money borrowed; and the lender as having a right to inſure for the ſum lent. If either were to inſure for more, it would be a *wager*. (*b*)

Upon a policy on *goods*, the plaintiff cannot give a reſpondentia bond in evidence in proof of intereſt.

In *Eaſt India* voyages the *lender* on bottomry or reſpondentia can only inſure the ſum lent, and the borrower, the ſurplus value.

But the uſage of a particular trade may ſanction a departure from this rule.—As where the captain of an *Eaſt Indiaman* made an inſurance on "*goods, ſpecie and* "*effects*" on board; he was permitted, in an action on his policy, to give in evidence of his intereſt, money which he had laid out in the courſe of the voyage, and for which he charged reſpondentia intereſt. (*c*)

But the uſage of trade may ſanction a departure from this rule.

It would ſeem, however, that, upon a policy on goods generally, the inſured may be permitted to give in evidence of his intereſt, a mortgage or other ſpecial *lien*. (*d*)

An intereſt in goods may be proved by a mortgage or other ſpecial *lien*.

In an action upon a policy on bottomry or reſpondentia ſecurities, evidence of the execution of the bottomry or reſpondentia bond, and of the intereſt of the obligor in the ſhip or goods, is ſufficient proof of intereſt in the inſured; and in ſuch caſe, the obligor himſelf is a competent witneſs to prove his own intereſt in the ſhip or goods on which he borrowed the money. (*e*)

Evidence of the execution of a bottomry or reſpondentia bond, and of the intereſt of the obligor, is ſufficient proof of intereſt in the obligee; and the obligor himſelf may prove his own intereſt.

4. *Proof*

(*a*) R. *Glover* v. *Black*, 3 *Bur.* 1394, 1 *Bl.* 399, 405, 422. ſup. 223.—(*b*) Per Lord *Manſfield*, ſ. c. 3 *Bur.* 1400.—(*c*) Vid. *Gregory* v. *Chriſtie*, ſup. 94.—(*d*) Semb. *Glover* v. *Black*, 1 *Bl.* 423. ſup. 225.—(*e*) Vid. 1 *Bl.* 396.

4. *Proof of Compliance with Warranties.*

The truth of affirmative, and the performance of executory, warranties, muſt be ſtrictly and literally proved.

Every material averment in the declaration muſt be proved. One of the moſt material averments is that of the truth of ſuch affirmative warranties, and the performance of ſuch executory ones, as are contained in the policy; ſuch as that the ſhip or goods inſured were neutral property; that the ſhip ſailed within the time limited by the policy; that ſhe departed with convoy; that ſhe was of the force warranted; that ſhe was manned with the ſtipulated complement of men, &c.—This averment of compliance with the expreſs warranties contained in the policy muſt be ſtrictly and literally proved; for theſe warranties, being in nature of conditions precedent, the compliance with them is an eſſential part of the plaintiff's title; and a non-compliance with any warranty contained in the policy, to whatever cauſe this may be imputable, deprives the inſured of all claim to the indemnity meant to be ſecured to him by the contract.

Proof of neutral property.

In the caſe of a warranty that the thing inſured is *neutral property*, it is uſual at the trial to give general evidence of the truth of that warranty; and leave it to the defendant to falſify it, or prove a breach or forfeiture of it. The evidence adduced by the defendant, for this purpoſe, is uſually a ſentence of condemnation as prize by one of the belligerent powers, either on the ground of the thing inſured having originally been enemy's property, or becauſe the ſhip, by ſome miſconduct, had forfeited her neutrality. Copies of the ſentence and of the other proceedings in the court of admiralty, properly authenticated, are always deemed ſufficient evidence of the fact of condemnation, and of the grounds upon which it proceeded. (*a*)

5. Proof

(*a*) Vid. ſup. ch. 8, § 4, n. 2, where it has been very fully ſhewn, in what caſes the ſentence of a foreign court of admiralty ſhall have validity in our courts, and be deemed concluſive evidence to falſify this warranty. Conſult alſo the other ſections of the chapter on warranties.

5. *Proof of the Loſs.*

The accident or misfortune which was the cauſe of the loſs muſt, as we have already ſeen, (*a*) be diſtinctly and explicitly ſet forth in the declaration, in order that the inſurer may have notice of the caſe againſt which he is to prepare his defence.

The true cauſe of the loſs muſt be ſet forth in the declaration.

To charge the inſurer, the loſs muſt appear to have happened during the continuance of the riſk; and caſes have frequently occurred in which this was the principal queſtion. What ſhall be the commencement and duration of the riſk has been already fully treated; (*b*) and little need be added here upon this ſubject. Suffice it to ſay, that in the caſe of a *ſhip*, if ſhe be inſured *from* a place, it will be ſufficient to prove that ſhe weighed anchor, or broke ground, in order to ſail on the voyage inſured. If the inſurance be *at and from* a place, the riſk commences from the time of ſubſcribing the policy, if the ſhip be at home; or from the firſt moment of her arrival at the place ſpecified, if that be in a diſtant part of the world.—If the riſk on the ſhip be from the loading the goods on board, then proof that any part of the cargo has been ſhipped, will be evidence of the commencement of the riſk.

The loſs muſt be proved to have happened during the continuance of the riſk.

In the caſe of a ſhip.

If the inſurance be on goods, the underwriter may, if he think proper, call on the inſured to prove that they were put in riſk. This may be done by the teſtimony either of the perſons who ſhipped them, or of thoſe who received them on board the ſhip mentioned in the policy. But the beſt evidence of this is the bill of lading, which, if *bonâ fide* made, is in all countries conſidered as an authentic document, and concluſive evidence of the quantity and ſpecies of goods laden on board; becauſe the captain, who muſt exhibit it on his arrival at the port of deſtination, is intereſted that it ſhall not include more in it than he has on board to deliver.—It is, as *Valin* juſtly obſerves, the true and ſpecific proof of the loading, and not

In the caſe of goods.

(*a*) Sup. 591.—(*b*) Sup. 161.

not only evidence, as between the captain and the merchant, but alſo againſt inſurers and all others. (*a*)—The underwriter may, however, impeach the bill of lading on the ground of fraud or colluſion. But the inſured cannot allege any thing in contradiction to it.

The loſs may be proved by the parol teſtimony of the maſter, officers, and crew of the ſhip, or by any other legal evidence that can be adduced for that purpoſe.

A proteſt is not evidence, while the perſon who made it is living.

But the following caſe will ſhew that the proteſt of the captain, ſo long as he is living, is in no caſe evidence on the one ſide or the other; the only uſe that can be made of it is to contradict his teſtimony, if he varies from it.

The broker's ſhewing it to an underwriter, with other papers relating to the loſs, on demanding payment, will not make it evidence againſt the inſured.

Senat v. *Porter*, 7 T. R. 158.

An inſurance broker applied to an underwriter for payment of a loſs, producing the different papers relating to the ſubject, and, among the reſt, the proteſt ſigned by the captain. The underwriter told him he had looked into the papers, and as there was a point in the caſe, he would not pay the loſs.—In an action on the policy, it was contended on the part of the defendant, that the proteſt was made evidence by the plaintiff, as a paper delivered by his agent to the defendant, containing an account of the loſs on which he reſted his claim; and therefore, that it amounted to a declaration made by the plaintiff to the defendant of the facts on which he required payment.—Lord *Kenyon*, who tried the cauſe, being clearly of opinion that the proteſt was not admiſſible evidence, the plaintiff obtained a verdict.—On a motion for a new trial, the court were clearly of opinion that the proteſt, of itſelf, could not be evidence; and its having been in the broker's hands, and ſhewn by him to the defendant, on an application for payment, would no more render it evidence, than a bill in equity could be made evidence againſt the plaintiff, becauſe its contents muſt have been ſhewn to the defendant.

If a loſs by capture be alleged, the plaintiff cannot prove a loſs by perils of the ſea.

The loſs muſt appear to have ariſen from the very cauſe alleged in the declaration, and no other. If, therefore, a loſs

(*a*) *Valin*, t. 1, p. 604. Vid. *Pothier*, h. t. n. 144. *Emerig.* t. 1, p. 314.

loſs be alleged in the declaration to have been occaſioned by *capture*, the plaintiff cannot, under ſuch an averment, prove a loſs by *perils of the ſea*, or by any other cauſe than capture. (*a*)

So, if there be two counts in the declaration, one for a loſs by *detention of people*, the other for a loſs by *pirates*; the plaintiff cannot, on either of theſe counts, give in evidence that a mob of rioters had boarded the ſhip, in order to compel the captain to ſell a cargo of corn at an inferior price; and that in conſequence of this boarding, the ſhip was ſtranded and a quantity of corn loſt. This could only be given in evidence upon a loſs by *ſtranding*. (*b*)

If a mob board a ſhip and run her on ſhore, whereby goods are loſt; this is a loſs by ſtranding, and not by *detention of people*, or by *pirates*.

Though it is a maxim in law that fraud ſhall never be preſumed, but muſt be ſtrictly proved; and it is a rule, founded on that maxim, that in queſtions of inſurance, he who charges barratry, muſt ſubſtantiate it by concluſive evidence; (*c*) yet it has been determined that proof of the captain's having carried the ſhip out of the regular courſe of the voyage, for fraudulent purpoſes of his own, is, *primâ facie*, ſufficient to entitle the plaintiff to recover as for a loſs by barratry; without ſhewing negatively, that he was not the owner, or that this was not done with the owner's conſent. (*d*)

Proof that the captain was guilty of barratry, is ſufficient; without ſhewing, negatively, that he was not owner, &c.

No evidence can be given of any loſs unleſs it be the immediate conſequence of ſome peril inſured againſt. That which is only a remote conſequence of ſuch peril is not within the policy. If this rule were not adhered to, it would be impoſſible to draw the line, and the inquiry into the remote conſequences of an accident or misfortune would be infinite.

No loſs is within the policy, which is not an immediate conſequence of ſome of the perils inſured againſt.

Thus, where an inſurance was made on a ſhip in the ſlave trade, "At and from *Briſtol* to the coaſt of *Africa*, "during her ſtay and trade there, and from thence to her "port or ports of diſcharge in the *Weſt Indies*." There was

In a policy on ſlaves, there is an inſurance againſt mortality by *mutiny*, and in a mutiny ſome are killed, others die of their wounds received in the mutiny, others of chagrin, others by ſwallowing ſalt-water, others jump overboard: The

(*a*) Vid. *Kulen Kemp* v. *Vigne*, 1 T. R. 304, ſup. 106.—(*b*) R. *Neſbit* v. *Luſhington*, 1 T. R. 783, ſup. 436.—(*c*) Barataríæ crimen nunquam eſt preſumendum, ſed concludentiſſimè probandum. *Caſaregis*, diſc. 1, n. 60; diſc. 225, n. 99. Vid. *Emerig.* tom. 1, p. 372.—(*d*) R. *Roſs* v. *Hunter*, 4 T. R. 33, ſup. 457.

insurer is liable for those who were killed or mortally wounded, in the mutiny; but not for those who died from other causes, though the *remote* consequences of the mutiny. Neither is he answerable for the diminution in value occasioned by the disposition manifested by the mutiny.

Jones v *Schmoll*, at N. P. Trin. Vac. 1785, 1 T. R. 130, n.

was a memorandum on the policy in these words;—"The insurers are not to pay any loss that may happen "in boats during the voyage, (mortality of negroes by "natural death excepted,) and not to pay for mortality "by *mutiny*, unless the same amount to 10 l. *per cent.* to "be computed upon the first cost of the ship, out-fit, and "cargo, valuing negroes so lost at 25 l. *per* head."—In an action upon this policy, the demand was for the value of a number of slaves *lost by mutiny*.—The evidence of the captain was that he had shipped 225 prime slaves on board: That on the 23d of *May*, before he sailed from the coast of *Africa*, an insurrection was attempted: That the women seized him on the quarter deck, and attempted to throw him overboard; but he was rescued by the crew: That the women, and some men, threw themselves down the hatchway, and were much bruised; and 12 men and a woman died of their bruises, and from abstinence: That on the 23d of *May*, there was a general insurrection, and the crew were from imminent necessity, obliged to fire upon the slaves, and attack them with weapons: That several slaves took to the ship's sides, and hung down in the water, by the chains and ropes; some for about a quarter of an hour: That several were killed by firing, several wounded, several died from swallowing salt water, or of their wounds, or from bruises; some from chagrin at their disappointment; some from abstinence; some from fluxes and fevers; in all to the amount of 55, who died during the voyage.—The underwriters had paid for 19, who were either killed during the mutiny, or died of their wounds, which amounted to 15 *per cent.* For the plaintiff it was contended that, though the rest did not actually die in the mutiny, or of any wounds received at that time; yet, as they had all died *in consequence* of the mutiny, the underwriters were liable. Another consequential loss was, that the circumstance of the mutiny had so lessened the value of the slaves, in the estimation of the planters, that they were sold for 17 l. a head less than they would otherwise have fetched.—Lord *Mansfield*, who tried the cause, said,—"I think the underwriters not answerable for the loss of the market, or the price

price of it: That is a *remote* conſequence, and not within any peril inſured againſt by the policy. The queſtion for the jury will be, whether any of thoſe, who died by any other means, except the being fired upon, or in conſequence of the wounds and bruiſes which they received during the ſtruggle, are within the meaning of the policy, which inſures againſt damage by mutiny. It is very clear that thoſe who were killed by the firing, or died in conſequence of their bruiſes during the mutiny, are within the policy; the other complicated caſe muſt be left to the jury. I think, clearly, thoſe *not* within the policy, who, being baffled in their attempts, in deſpair, choſe a mode of death, by faſting, or died through deſpondency. That is not a mortality by mutiny, but the reverſe; for it is by the failure of a mutiny.—The great claſs are ſuch as received ſome hurt by the mutiny, but not mortal, and died afterwards from other cauſes; as thoſe who ſwallowed ſalt water, jumped overboard, &c.—This is the great point."—The jury found,—that all who were killed, or died of their wounds or bruiſes, which they received in the mutiny, though accompanied with other cauſes, were to be paid for: But, that all who had died by ſwallowing ſalt water, or leaping into the ſea, or hanging upon the ſides of the ſhip, without being otherwiſe bruiſed, or died of chagrin, were not to be paid for.

A ſhip is driven by *ſtreſs of weather* on an enemy's coaſt, and there captured. This is a loſs by *capture*, not by the perils of the ſea.

So, where the ſhip *Fly* was inſured from *Exeter* to *London*, againſt *capture* only; and the ſhip on her voyage was driven by a gale of wind on the coaſt of *France*, and there captured by the enemy.—In an action on the policy it was contended on the part of the defendant, that this was a loſs by the perils of the ſea, and not by capture. But Lord *Kenyon*, who tried the cauſe, held that this was clearly a loſs by capture; for had the ſhip been driven on any other coaſt than that of an enemy, ſhe would have been in perfect ſafety. The jury, under this direction, found a verdict for the plaintiff.

Green v. *Elmſlie*, at N. P. *Peake*, 212.

But the plaintiff may give in evidence any loſs or damage which is an immediate conſequence of the accident or injury alleged in the declaration.—As where it was averred in the declaration, that the ſhip ſprung a leak and ſunk in the river, whereby the goods were ſpoiled:

But the plaintiff may give in evidence any loſs immediately proceeding from the cauſe alleged in the declaration;

as payment of ſalvage when the loſs is averred to have happened by the ſinking of the ſhip.

Carey v. *King*, Ca. temp. *Hard.* 304.

ſpoiled: And the evidence was, that many of the goods were ſpoiled, but ſome were ſaved. The queſtion was, whether the plaintiff might give in evidence the *expenſe of ſalvage*, though not particularly ſtated in the declaration, as a breach of the policy.—Lord *Hardwicke* ſaid,—"I think they may give it in evidence; for the inſurance is againſt all accidents. The accident laid in the declaration, is, that the ſhip ſunk in the river: It goes on and ſays, that by reaſon thereof the goods were ſpoiled. This is the only ſpecial damage laid: Yet it is but the common caſe in a declaration that lays ſpecial damage, where the plaintiff may give in evidence any damage that is within his cauſe of action as laid. It was objected that ſuch a breach of the policy ſhould be laid that the inſurer may have notice to defend it. Now it is ſo in this caſe, for they had laid the accident, which is ſufficient notice, becauſe ſome damage muſt have happened."

The loſs muſt be a direct and immediate conſequence of the cauſe alleged.

The loſs muſt appear not only to have proceeded from the very cauſe alleged in the declaration, but alſo to be a direct and immediate conſequence of the accident or misfortune which has happened to *the very thing inſured*. Therefore an expenſe which is incurred in conſequence of the accident or misfortune ſtated in the declaration, but which is not incurred in repairing the damage occaſioned by it, cannot be given in evidence as part of the loſs within the meaning of the policy.

Wages and proviſions expended during a repair of ſea-damage, is not a loſs within a policy on the *ſhip*.

Fletcher v. *Poole*, at N. P. after Eaſt. 1769, *Park* 52.

Thus, where a ſhip was inſured, "At and from *London* to *Newcaſtle* and *Marſeilles*, and from thence to "the *Weſt Indies*."—The ſhip, in diſtreſs, bore away for *Minorca*, where it being found neceſſary to repair her, ſhe was unavoidably detained there a conſiderable time. —The inſured brought an action on the policy, to recover the extraordinary *wages and proviſions* expended during this detention.—But Lord *Mansfield*, who tried the cauſe, was of opinion that ſuch a demand could never be allowed as a charge againſt the inſurer *on the ſhip*; and a verdict was accordingly given for the defendant.

Upon a policy on *ſhip and goods*, the inſured can-

So where an inſurance was made "on *ſhip and goods*, "from *Oſtend* to *Dominique*."—The ſhip in her voyage having

having met with bad weather, and being in great diſtreſs, the crew threatened to take the command from the maſter, unleſs he would make for the firſt port. The maſter bore away for *Ferol* to repair the ſhip; but by the time the repairs were finiſhed, the crew deſerted her. He then got another crew, and at the moment he was going to ſail, the *Spaniſh* governor ſtopped him, and after detaining him 37 days, diſcharged him, and he proceeded on his voyage, and at length arrived at *Dominique*.—An action was brought on the policy to recover the loſs incurred by *wages*, *proviſions*, and *demurrage*, during the ſhip's detention at *Ferol*.—On the part of the underwriters it was contended that the freight, and not the ſhip, is liable for this loſs, and that the charge of demurrage could not be allowed upon this policy.—Mr. Juſtice *Buller*, who tried the cauſe, was of this opinion, and nonſuited the plaintiff.

not recover for wages, proviſions or demurrage, during a ſhip's ſtay to repair, and detention by a foreign power.

Eden v. *Poole*, at N. P. after Hil. 1785. *Park*, 54.

So, where a *ſhip* was inſured, "At and from *London* "to *Africa*, during her ſtay and trade there, and to her "port of diſcharge in the *Weſt Indies*."—The ſhip on her voyage from *Africa* with a cargo of ſlaves to her port of diſcharge in the *Weſt Indies*, touched at *Barbadoes* for the purpoſe of watering, where ſhe was detained a conſiderable time by an embargo, which had been before laid by the commander in chief on all ſhips at that iſland. The captain applied for leave to depart, and being refuſed, he ſailed without leave, but was purſued by a ſloop of war, and after a ſlight engagement, brought back, and the crew diſtributed among the men of war. The embargo continued from the 18th of *December*, till the 27th of *January*. The ſmall pox broke out among the ſlaves on the 22d of *January*. In conſequence of all this, and for want of mariners to navigate the ſhip, ſhe was detained at *Barbadoes* above two months after the embargo was taken off. She then ſailed to *Jamaica*, her place of diſcharge.—An action was brought on the policy to recover the amount of the additional *wages and proviſions* occaſioned by the ſhip's detention under the embargo. Mr. Juſtice *Buller*, who tried the cauſe, was of opinion that this policy, being upon the body of the ſhip, and the average loſs thereon, excluſive of the charge for wages and

The inſured upon a policy *on the ſhip*, cannot recover the expenſe of wages or proviſions occaſioned by a detention under an *embargo*.

Robertſon v. *Ewer*, 1 T. R. 127.

and proviſions, being leſs than 3 *per cent.*, the plaintiff was nonſuited.—Upon a motion to ſet aſide this nonſuit, it was contended, on the part of the plaintiff, *firſt*, that this loſs, being occaſioned by the embargo for which the inſured might have abandoned, and recovered as for a total loſs, he might recover a partial loſs to the amount of the damage actually ſuſtained; (*a*) and *ſecondly*, that this was a loſs occaſioned by the barratry of the maſter, by his reſiſtance to lawful authority.—But the court determined that the plaintiff had no right to recover on either ground.—Lord *Mansfield* ſaid,—"There is no authority to ſhew that, on this policy, the inſured can recover for ſuch a loſs; but it is contrary to the conſtant practice. On a policy on a *ſhip*, ſailor's wages, or proviſions, are never allowed in ſettling the damages. The inſurance is on the body of the ſhip, tackle, and furniture, not on the voyage or crew. Here it is admitted that no damage was done to the ſhip, tackle, or furniture; and therefore I think the direction was right, and that the plaintiff ought not to recover."—Mr. Juſtice *Buller* ſaid,—"If the ſhip had been detained in conſequence of an injury which ſhe had received in a ſtorm, though the underwriters muſt have made good the damage; yet the inſured could not have claimed the amount of wages or proviſions, during the time ſpent in repairing. The court only look to the *ſubject matter of the inſurance*. Here the ſhip was ſafe; and the wages and proviſions are no part of the thing inſured."

Yet a ſhip's proviſions are conſidered as *part of the ſhip*, and are protected by the policy.

Yet, in the following caſe, which is not eaſily reconcileable with the three foregoing caſes, it was the opinion of the court that a ſhip's proviſions are protected by the policy, even when landed on a *Bank-Saul* during a repair: and that they were to be conſidered as a *part of the ſhip*.

A ſhip's proviſions, during a repair, are landed on a *Bank-Saul*, and there conſumed by fire: The underwriters on the ſhip

An inſurance was made on a *China* ſhip; and, in the uſual words, "On the tackle, ordnance, ammunition, "artillery, and *furniture* of the ſhip."—In an action on this policy, it appeared that while the ſhip was lying off *Bank-Saul Iſland*, in the river *Canton*, it became neceſſary to

(*a*) Vid. *Rotch* v. *Edie*, 6 T. R. 425, ſup. 439.

to refit her, for which purpoſe, the ſtores and proviſions were taken out of her, and put into a warehouſe called a *Bank-Saul*, where they were deſtroyed by accidental fire.—At the trial, this accident was conſidered as if it had happened *on board the ſhip*, (*a*) and it was admitted that the policy covered all the articles but the *proviſions*, and if they were not protected by the policy, then there would not be a partial loſs of 3 *per cent.*—On the part of the defendant it was contended that the proviſions, which were merely for the ſhip's crew, were not protected by a policy on the *ſhip*. But one of the jury, obſerving that it had been determined in Lord *Mansfield's* time, that they were included under the word "*furni-*"*ture*," and that the merchants in the city had ever ſince acquieſced in this deciſion, there was a verdict for the plaintiff.—On a motion for a new trial, the above caſe of *Robertſon* v. *Ewer* was relied on as a clear authority, to ſhew that the ſhip's proviſions were not protected by a policy on the ſhip; and that, if proviſions were included in the term "furniture," there could never be a total loſs, after a conſumption of any part of them. —The court, however, were unanimouſly of opinion that the underwriters were liable for the expenſe of the proviſions which were bought to replace thoſe conſumed by the fire, which was an accident within the words of the policy.—Lord *Kenyon* ſaid,—"When it was ſtated, at the trial, that *proviſions* were included in the word '*furniture*,' I confeſs I was ſomewhat at a loſs to know to what extent the underwriters were liable on words ſo indefinite as theſe which are uſed. If the proviſions be inſured as part of the out-fit of the ſhip, and they were deſtroyed by one of the perils inſured againſt, there is an end of the queſtion; a loſs has happened within the meaning of the policy, and conſequently the defendant is liable. But it was ſaid in the argument, that the inſtant any of the proviſions were conſumed on board, there could not be a total loſs: But the anſwer is, that that comes within the *wear and tear of the ſhip*; and it might as

and *furniture* are liable.

Brough v. *Whitmore*, 4 T. R. 206.

(*a*) Vid. *Pelley* v. *Roy. Ex. Aſſ.* 1 *Bur.* 341, ſup. 181.

The distinctions made between this case and that of *Robertſon* v. *Ewer.*

as well be ſaid, that if a maſt were a little injured, there could not be a total loſs. The caſe of *Robertſon* v. *Ewer* is clearly diſtinguiſhable from the preſent. Here the proviſions were conſumed by an accidental fire on board the ſhip, (for the iſland and the ſhip were, for this purpoſe, the ſame,) and within the meaning of the policy; but, in that caſe, they were conſumed *by the negroes*, during the detention of the ſhip." (*a*)—Mr. Juſtice *Buller* ſaid, —"It is perfectly clear that, in every inſtance where loſſes have been ſettled, the proviſions put on board the veſſel, when ſhe ſailed, have been conſidered as *part of the ſhip*. The value of the ſhip alone comprehends the hull, the maſts, the tackle, and the *proviſions*. Then, if the proviſions be included in a policy on the *ſhip*, and all the proviſions be loſt, the underwriters muſt make good the whole loſs, whether it be a valued or an open policy. But it has been ſaid, that if an accident happen after ſome of the proviſions are conſumed, the underwriters are entitled to a deduction to the amount of ſuch proviſions: I will anſwer this, as the argument applies, firſt, to a valued, and then, to an open policy. As to the firſt; from the nature of the policy, the proviſions are not inſured againſt all events; they are only inſured againſt particular riſks. Again, there is nothing from which

(*a*) According to the report of *Robertſon* v. *Ewer*, Lord *Mansfield* laid it down as a general rule, not reſtricted to any particular trade, that on a policy on a *ſhip*, ſailor's wages or *proviſions* are never allowed in ſettling the damages; nor was it ever objected in that caſe, that the proviſions had been conſumed by the ſlaves. Indeed, it is not likely that ſuch an objection could have been made; for it is well known, that the food provided for the ſlaves is part of the cargo, and very different from that which is provided for the ſhip's company; beſides, the ſhip's company muſt have conſumed a part. But, be this as it may, if it be neceſſary, in order to ſupport the caſe of *Robertſon* v. *Ewer*, to ſuppoſe that the proviſions, for which the inſured wanted to charge the underwriters, were *conſumed by the ſlaves*, and not by the crew, then the caſes of *Fletcher* v. *Poole*, and *Eden* v. *Poole*, where no ſuch ground could be alleged, cannot be ſuſtained.

which there can be ſalvage: If the body of the ſhip, and every thing on board, be ſunk, or burned, there can be no ſalvage. And, in the caſe of an open policy, the inſured muſt prove, by evidence, what was the value of the whole; and then the ſame reaſons apply as in the caſe of a valued policy. With reſpect to the caſe of *Robertſon* v. *Ewer*, I thought at firſt that it applied ſtrongly to the preſent; and if I ſtill entertained the ſame opinion, I would not, on account of any uſage to the contrary among underwriters, overturn a ſolemn determination of this court: But that caſe, and the two others there mentioned, are clearly diſtinguiſhable from the preſent. In all thoſe caſes the inſured wiſhed to charge the underwriters with the amount of the proviſions conſumed, during the time when the ſhips were detained. Of thoſe, therefore, it is ſufficient to ſay, that an inſurance is on the ſhip *for the voyage*; but during a detention, the ſhip is not proceeding; and therefore the underwriters are not liable. (*a*) This caſe alſo differs from *Robertſon* v. *Ewer* in another circumſtance: There, the proviſions were conſumed by the ſlaves on board, and not by the ſhip's crew, and the ſlaves are conſidered as a part of the cargo. The words of Lord *Mansfield*, in that caſe, muſt be taken with reference to the caſe then before him. He was then ſpeaking of a charge for proviſions and during the detention of the ſhip, and for the maintenance of the ſlaves; and he ſaid;—"There is no authority to ſhew that, on "*this* policy, the inſured can recover for *ſuch a loſs*; but "it is contrary to the conſtant practice." Then he proceeded to ſay that, on a policy on a ſhip, ſailor's wages or proviſions are never allowed in ſettling the damages. Now, even if thoſe latter words be taken in their general ſenſe, and not confined to the caſe immediately before the court, they are accurate; for proviſions, *eo nomine*, are not taken into conſideration.—If the captain be obliged, in

(*a*) There muſt be ſome miſtake of the reporter in this place. It cannot be ſuppoſed that the learned judge ever meant to ſay, that while a ſhip is detained, ſhe is not under the protection of the policy.

in conſequence of the detention, to purchaſe other ſtores for the remainder of the voyage, the underwriters are not anſwerable for theſe; but only for thoſe which were on board at the time of the inſurance, ſince they only formed a part of the value of the ſhip.—The uſage of merchants, as to the conſtruction of theſe inſtruments, ſtands unimpeached, and therefore it muſt prevail in this caſe."

When the expenſe of wages and proviſions ſhall be a general, when a particular, average.

By the law of *France*, (*a*) the expenſe of wages, and proviſions of the ſeamen during a detention, are reputed a *groſs*, or *general average*, if the ſhip was hired *by the month*; but if hired *for the voyage*, this expenſe is borne by the ſhip alone, as a ſimple average.—*Pothier* (*b*) gives the following reaſon for this diſtinction. The wages of the ſailors being included in the *freight*, when the ſhip is chartered *for the voyage*, the owner, who receives freight for the whole voyage, is bound to ſupply the labour of the ſailors for the whole time of the voyage, of which the time of the detention makes a part.—On the other hand, when the ſhip is chartered *by the month*, the owner, receiving no freight during the detention, owes no ſervice of the ſailors to the affreighter. The affreighter, therefore, ought, in conſideration of the benefit he derives from the labour of the ſailors, to pay for their labour and proviſions during the detention.

But the uſage of trade often determines what ſhall be deemed part of the ſhip.

But the uſage of trade often controls the general conſtruction of the policy; and what ſhall or ſhall not be protected as part of the ſhip and furniture depends, in ſome caſes, on the uſage of a particular trade.

Whether the fiſhing tackle in the *Greenland* whale fiſhery be included in a policy on the ſhip, depends on the uſage of the trade.

As, where an inſurance was made, in the uſual form, on a ſhip employed in the *Greenland* fiſhery; and, in an action on the policy, the queſtion was, whether the *fiſhing-tackle* was included in the inſurance on the *ſhip, furniture*, &c.—Lord *Mansfield*, who tried the cauſe, ſaid that there was no doubt but that the boats, and rigging, and ſtores, belonging to the ſhip were included; and as to the fiſhing ſtores, it muſt depend on the *uſage of the trade.*

Hoſkins v. *Pickerſgill*, E. 23 *G.* III. B. R. MS.

(*a*) Ord. de la mar. tit. *des avaries*, art. 7. Vid. *Emerig.* tom. 1, p. 539.—(*b*) Tit. *des chartes parties*, n. 85.

trade. On this, there was contradictory evidence. The plaintiff, however, obtained a verdict, which the court afterwards ſet aſide, and granted a new trial, upon the ground that the evidence of the uſage was principally in favour of the defendant.

The *captain's clothes, the ſhip's proviſions, and goods laſhed to the deck*, are not within a policy on *goods*.

In a former chapter we had occaſion to obſerve that the *captain's clothes*, the *ſhip's proviſions*, and *goods laſhed to the deck*, are not comprehended under the general denomination of "*goods, wares, and merchandizes,*" in the policy; and that the inſurer is not, therefore, liable for any loſs on theſe articles unleſs they be ſpecifically named. (*a*)

Roſs v. *Hunter*, at N. P. after Hil. 16 *G.* III. *Park* 20.

Therefore, where an action was brought on a policy on *goods*, the property of the captain, for ſix months, the loſs proved was chiefly for *goods laſhed to the deck*, the captain's *clothes*, and the *ſhip's proviſions*.—On the part of the defendant it was proved by an underwriter and a broker, that none of theſe things are within a general policy on *goods*; becauſe the riſk is greater, as to goods laſhed on deck, than on other goods; and that a policy on goods generally, means only ſuch goods as are merchantable, and a part of the cargo. They alſo ſwore that when goods like the preſent are meant to be inſured, they are always inſured by name, and the premium is greater.—Lord *Mansfield* ſaid he thought it conſiſtent with reaſon, and underſtood the uſage to be ſo; and therefore the plaintiff withdrew a juror, the premium having been paid into court.

The inſured on *goods*, is not entitled to freight paid *pro rata itineris*, during capture.

In an action on a policy on *goods*, the inſured cannot recover for freight *pro rata itineris* paid by the owner of the goods to the owner of the ſhip; where the ſhip is captured and detained by a foreign power, and afterwards reſtored.

Goods are inſured, the ſhip and goods are captured and ſold, but the ſentence reverſed, and the proceeds ordered to be paid to the owners: The

Thus: In an action on a policy of inſurance on goods, "At and from *Nevis* to *Briſtol*," it appeared on the trial that the ſhip on her voyage was captured by the *French*, carried into *Morlaix*, and there condemned. Upon an appeal to the parliament of *Paris*, this ſentence was reverſed, and the ſhip and cargo were decreed to be reſtored;

(*a*) Vid. ſup. 225.

freight *pro rata itineris*, paid by the owner of the goods, is not a charge for which the insurers on the goods are liable.

Bailie v. *Modigliani*, Hil. 25 G. III. B.R. MS.

stored; or the net proceeds thereof, if sold, to be paid to the claimants. The ship and cargo having been sold before this sentence was obtained, the money, after deducting all charges, was remitted to the plaintiff, who was agent for the owners of the ship, the owners of the goods, and the underwriters.—The underwriters paid the charges of the suit, and all other expenses. The plaintiff (the common agent) paid to the owners of the ship, freight *pro rata itineris*; and the question was, whether he was to be reimbursed by the owners of the goods, or whether this was a loss within the policy, for which the underwriters were liable.—The court, after time taken to deliberate, were unanimously of opinion, that the underwriters were not liable to this charge.—Lord *Mansfield* said,—"The question is, whether the owner of the goods can charge the underwriters with this *item*, which was paid for freight *pro rata itineris*, by the owners of the goods to the owners of the ship. As between the owners of the ship, and the owners of the cargo, in case of a total loss, no freight is due: But, as between *them*, no loss is total, where part of the property is saved, and the owner takes it to his own use. Here the value of the goods was restored in money, which is the same as the goods; and therefore freight was certainly due *pro rata itineris*. But, as between the insured and the underwriters *upon the cargo*, it is a contract of indemnity, and the latter have nothing to do with the *freight*. The owner of the ship has a lien for his freight; but in the case of a loss, really total, no freight is due. In the case of a loss, total as between the insurer and insured, with salvage, the owner may either take the part saved or abandon; but in neither case can he throw the freight upon the underwriters; because they have not engaged to indemnify him against it, and have nothing to do with it."

The underwriters on *goods* are in no case liable for *freight*.

In assumpsit the plaintiff recovers damages according to the evidence *pro tanto*, and therefore he is not obliged to prove all the damage alleged in his declaration.—Hence, though the plaintiff declare as for a *total loss*, he

If the plaintiff declare upon a total loss, he may recover for a partial loss.

he may recover as for a *partial loſs*.—So, if he declare as for a total loſs of the entire thing inſured, when in fact he was only owner of, or intereſted in a *part* thereof, and the loſs be only partial, yet he ſhall recover his proportion of ſuch partial loſs to part.

So if he declare for a loſs upon an entire thing, when he is owner of only a part.

Thus:—An inſurance was made on *one fourth* of a ſhip; and the inſured declared expreſsly as for a *total loſs* of the ſhip; but the evidence only proved a partial loſs; nor was it attempted to prove a total one, the damage being ſo ſmall that it might have been repaired for 50 l. —It was objected at the trial, on the part of the defendant, that evidence of a *partial loſs*, was not ſufficient to maintain a declaration for a *total loſs*, and it was ſuggeſted that the practice was contrary.—A verdict, however, was taken as for a partial loſs, ſubject to the opinion of the court on the above queſtion.—The court were clearly of opinion with the plaintiff.—Lord *Mansfield* ſaid,—"I was ſatisfied upon principles, provided the practice did not interfere; but, having heard of no determination in ſupport of the practice alleged, the caſe muſt ſtand upon principles; and, upon principles, it is clear that the plaintiff may, upon this declaration, recover as for a partial loſs. This is an action of *aſſumpſit*, which is a liberal action; and the plaintiff may recover *leſs* than his declaration would ſupport, though not *more*. There are two grounds of the plaintiff's declaration; the policy, and the damage to the ſhip. Whether this be a total or a partial loſs, is a queſtion that goes to the *quantum of damages*, not to the *ground of the action*. The ground of the action is the ſame, whether the loſs be total or partial; both are perils within the policy. As to the defendant's not coming prepared to defend a partial loſs; this, indeed, would be an objection, if it were true: But the defendant does, in truth, come prepared to ſhew, either, that no damage had happened at all; or, at leaſt, that damage had not happened to the extent alleged.—Neither could the defendant have been hurt by a judgment by default; for the plaintiff could not have recovered, upon the writ of inquiry, more damages

Upon an inſurance on *one fourth* of a ſhip Plaintiff declares as for a *total loſs*; but proves only a *partial loſs*, he ſhall recover ſuch partial loſs.

Gardiner v. *Croſdale*, 2 *Burr.* 904, 1 *Bl.* 198.

damages than he could prove that he had actually ſuffered. If this objection were to prevail, it would introduce the addition of unneceſſary counts in the declaration. In an ejectment for more, the plaintiff may recover leſs: It is every day's practice."—Mr. Juſtice *Deniſon* concurred, and ſaid,—"In an action for damages, the plaintiff is to recover according to his proof, *pro tanto*; but he is not obliged to prove all that he has alleged. If it had been an action of covenant for pulling down a houſe, might not the plaintiff be entitled to damages for pulling down a part of it? This is no variance of the evidence from the declaration. The evidence tends, in a certain degree, to the proof of what is alleged in the declaration. Two counts would have been unneceſſary."

One of ſeveral part owners of a ſhip may inſure the freight generally, without mentioning what ſhare he has in the ſhip; and he may declare generally, and recover according to his intereſt.

So, where the plaintiff was one of four part owners of a ſhip, and each inſured the freight without mentioning that it was only a *ſhare of the freight* that he was intereſted in.—The plaintiff, in his declaration, ſtated his intereſt generally, and not as being an *aliquot part* of the ſhip.—It was objected on the part of the defendant, that the plaintiff ſhould have alleged his intereſt according to the truth, and not in that general form. That the regiſter of the ſhip, which was produced, was concluſive evidence as to the perſons who were owners, and of their reſpective ſhares; and the regiſter ſhewed that the plaintiff was only owner of the fourth part.—Mr. Juſtice *Buller*, who tried the cauſe, held, that this being an open policy, (*a*) the plaintiff might recover according to his intereſt; and he had a verdict accordingly.

Riſing v. *Burnett*, at N. P. C. B. 12 *December* 1798, MS.

A fortiori if he prove a greater intereſt than he alleged.

So, if the plaintiff prove a greater intereſt than he alleged in his declaration, this ſhall not preclude him from recovering to the extent of the intereſt he has alleged.

Page v. *Rogers*, at N. P. after Hil. 1785, *Park* 402.

Thus, where the declaration ſtated that the plaintiff was poſſeſſed of *one third* of the ſhip inſured; and it was proved that he had purchaſed the *whole* at one period.

There

(*a*) Had it been a *valued policy*, it would have made no difference in this caſe; for the inſurer may diſpute the amount of the intereſt of the inſured if it be over-valued, as well in an action upon a valued policy, as upon an open one.

There being no evidence to ſhew that he had ſince parted with any ſhare of it, it was inſiſted that this was a variance.—But Lord *Mansfield* held that this was ſufficient evidence; for, *omne majus continet in ſe minus*; and overruled the objection.

By the preamble to the ſecond ſection of the ſtat. 19 G. II. c. 32, it appears that, before the paſſing of that act, if an obligor in any bottomry or reſpondentia bond, or an inſurer in any policy of inſurance, became bankrupt before a loſs happened, it was made a queſtion whether the inſured in ſuch policy, or the obligee in ſuch bond, could be let in to prove his debt, or to receive any dividend under the commiſſion: But now, by that ſection, it is provided, 'That ſuch obligee or inſured 'ſhall be admitted to claim, and after the loſs or con-'tingency ſhall have happened, to prove, his debt, and 'to receive a dividend of the bankrupt's eſtate, in pro-'portion to the other creditors; and that the bankrupt 'ſhall be diſcharged from the debt owing from him on 'ſuch bond or policy, in like manner as if ſuch loſs or 'contingency had happened, and the money had been 'payable, before the iſſuing of the commiſſion.'

By 19 G. II. c. 32, if an underwriter become bankrupt before a loſs happen, the inſured may claim; and after a loſs, prove his debt under the commiſſion, and receive his dividend, as if the loſs had happened before the bankruptcy.

As the words of the above preamble refer only to bottomry contracts, and inſurances on ſhip and goods on board, it became a doubt whether it extended to *inſurances upon lives*, though the words of the enacting part are general; and it was ſuppoſed that the legiſlature could not have had inſurance upon lives in contemplation, becauſe the riſk in ſuch inſurances may remain unſettled for many years:—But it has been determined that the general words of the enacting part are not reſtrained by the preamble; and that it comprehends *all inſurances*, and conſequently inſurances *upon lives*. (*a*)

This ſtatute extends to inſurances upon lives.

BOOK

(*a*) R. *Cox* v. *Loſtard*, B. R. Hil. 24 G. III. *Doug.* 166. n. Vid. *Pattiſon* v. *Banks*, *Cowp.* 540; and *Mace* v. *Cadell*, *Cowp.* 232.

BOOK THE SECOND.

Of Bottomry and Reſpondentia.

THIS ſubject may be treated under the following diſtribution;

1. Of the nature and form of the contract;
2. Of the parties to it;
3. Of the thing hypothecated;
4. Of the principal and marine intereſt;
5. Of the perils or riſks to which the lender is liable;
6. Whether he be liable to *general average*;
7. Whether he be entitled to the *benefit of ſalvage*.

CHAP. I.

Of the Nature and Form of this Contract.

Bottomry defined.

BOTTOMRY is a contract in nature of a mortgage of a ſhip, on which the owner borrows money to enable him to fit out the ſhip, or to purchaſe a cargo for a voyage propoſed; and he pledges the keel or *bottom* of the ſhip, *pars pro toto*, as a ſecurity for the repayment: And it is ſtipulated that if the ſhip ſhould be loſt, in the courſe of the voyage, by any of the perils enumerated in the contract, the lender alſo ſhall loſe his money; but if the ſhip ſhould arrive in ſafety, then he ſhall receive back his principal, and alſo the intereſt agreed upon, which is generally called the *marine intereſt*, however this may exceed the legal rate of intereſt. (*a*) Not only the ſhip and

(*a*) Vid. 2 *Bl.* Com. 458.

and tackle, if they arrive ſafe, but alſo the perſon of the borrower, is liable for the money lent and the marine intereſt.

When the loan is not on the ſhip, but on goods laden on board, which, from their nature, muſt be ſold or exchanged in the courſe of the voyage, the borrower's perſonal reſponſibility is then the principal ſecurity for the performance of the contract, which is therefore called *reſpondentia.* (*a*) In this conſiſts the principal difference between bottomry and reſpondentia. The one is a loan upon the ſhip, the other upon the goods. In the former, the ſhip and tackle, being hypothecated, are liable, as well as the perſon of the borrower; in the latter, the lender has, in general, only the perſonal ſecurity of the borrower. But the perſonal reſponſibility of the borrower is not in all caſes, the only ſecurity of the lender. Where the money is lent for the outward and homeward voyage, the goods of the borrower on board, and the returns for them, whether in money, or in other goods purchaſed abroad with the proceeds of them, are liable to the lender. (*b*) The money is to be repaid to the lender, with the marine intereſt, upon the ſafe arrival of the ſhip, in the one caſe, and of the goods, in the other. In all other reſpects, theſe contracts are nearly the ſame, and are governed by the ſame principles.

Reſpondentia.

Difference between them.

The contract of bottomry is called by the *French, contrat de prêt à la groſſe avanture,* or *contrat à la groſſe.* In *Le Guidon* (*c*) it is called *bomerie,* and *Molloy* (*d*) ſays that it is derived from *bomerie* or *bodmerie,* a *Flemiſh* word which ſignifies the *keel* or *bottom* of a ſhip.

Denomination.

Though it is extremely probable, as we have already ſhewn, (*e*) that the contract of inſurance was unknown among the ancients, it is certain that the *Romans* were well acquainted with that of bottomry, or rather reſpondentia, which they denominated *nauticum fœnus* or *contractus trajectitiæ*

In uſe among the *Romans.*

(*a*) 2 *Bl.* Com. 458.—(*b*) *Pothier,* h. t. n. 34. *Emerig.* t. 2, p. 476, 561.—(*c*) Ch. 18.—(*d*) De jur. marit. b. 2. c. 11, § 12.—(*e*) Sup. 5.

Pecunia trajectitia.

jectitiæ pecuniæ; and it is treated of both in the *Digeſt* and the *Code, de nautico fœnore.* They called the ſum lent *pecunia trajectitia,* perhaps becauſe the borrower was uſed to take the money on board with him in ſpecie, in order to employ it in trade in the courſe of the voyage; for ſuch was probably the original deſtination of ſuch loans among the *Romans,* who exported very little from *Rome,* but ſent money from thence to purchaſe the merchandize which the immenſe conſumption of that city demanded. The money thus lent was to be repaid, if the voyage proved fortunate, with a ſtipulated intereſt, which was called *periculi pretium,* ſometimes *uſura maritima,* or *uſura nautica;* but upon this condition, that if the ſhip ſhould be loſt by the perils of the ſea, in the courſe of the voyage propoſed, the lender ſhould loſe both principal and intereſt.

If the money was ſpent on ſhore, it was not *pecunia trajectitia.*

If the money was ſpent in the place where it was lent, it was not *pecunia trajectitia.* (*a*) But if it was laid out in the purchaſe of goods, which were embarked at the riſk of the lender, then it retained its quality of *pecunia trajectitia.* So that, with the *Romans,* as with the moderns, it was of the eſſence of this contract that the loan ſhould be expoſed to the perils of the ſea, at the riſk of the lender.

Whether the *Roman nauticum fœnus* be materially different from the modern bottomry.

The author of *Le Guidon* (*b*) ſays that there is but little reſemblance between the contract of bottomry, as it is in uſe in modern *Europe,* and the *nauticum fœnus* of the *Romans.* But upon an attentive compariſon of the one with the other, it will appear that they are ſtill in principle the ſame; and only differ in the forms which modern regulations have given to the contract now in uſe.

How bottomry differs from a ſimple loan.

Bottomry differs very materially from a ſimple loan. In a loan, the money is at the riſk of the borrower, and muſt be paid at all events. *Incendium ære alieno non liberat debitorem.* (*c*) But in bottomry, the money is at the

(*a*) Si eodem loci conſumatur, non erit trajectitia, ff. de neut. fœn. 1.—(*b*) Ch. 18, art. 1.—(*c*) Cod. l. 11, ſi cert. pet.

the riſk of the lender during the voyage. Upon a loan, only the legal intereſt can be reſerved: But upon bottomry, any intereſt may be legally reſerved which the parties agree upon.

Analogy between bottomry and inſurance.

The analogy between this contract and that of inſurance is much ſtronger. In the one the lender, in the other the inſurer, is liable to the perils of the ſea; the one receives the marine intereſt, the other the premium, as the price of the riſk, which varies in each according to the length and danger of the voyage. The lender and the inſurer are, in general, expoſed to the ſame perils, which have the ſame commencement and end. The marine intereſt, like the premium of inſurance, is not due, if no riſk be run, though this be prevented by the voluntary act of the borrower.

How they differ.

But though theſe contracts thus far agree, they differ eſſentially in many reſpects. In bottomry, the lender furniſhes the borrower with the money to purchaſe the goods which are put in riſk; an inſurer, on the contrary, furniſhes nothing of the ſubject matter of the inſurance.—The lender, in taking on himſelf the riſk of the goods, does not contract any obligation to the borrower; a loſs by the perils of the ſea does not make him a debtor to the borrower, but only prevents the borrower from becoming his debtor: Whereas, upon a loſs happening, the inſurer becomes a debtor to the inſured to the amount of ſuch loſs, not exceeding the ſum inſured. (*a*)—In caſe of ſhipwreck, the lender, by the general law, has a *lien* on the effects ſaved, to the extent of the ſum lent and the marine intereſt, *to the excluſion of the borrower;* whereas an inſured has an intereſt in the effects ſaved, *in common with the inſurer*, ſo far as he was uninſured.—The lender is not liable for particular average; but the inſurer is liable for this, unleſs he be exempt by expreſs ſtipulation.—By the clauſe, *free of average*, inſurers may be exempted from general average; but, in a caſe where the lender is liable by law to general

(*a*) *Pothier*, h. t. n. 6.

ral average, ſuch a clauſe would be illegal and void. (*a*) If the voyage be diviſible into ſeveral diſtinct riſks, the premium of inſurance may be apportioned to each, and there may be a return for ſuch as have not been begun; but, in bottomry, if the riſk be once commenced, and no loſs happen, the marine intereſt muſt be paid entire. (*b*)

The utility of this contract.

This contract is of great utility in a country where the perſons engaged in trade have not a ſufficient capital to carry on their foreign commerce, by inducing thoſe unſkilled in trade to embark their money in it; and thus is formed a ſort of partnerſhip between the lender and the borrower, in which the one ſupplies capital, the other ſkill and experience: The one takes upon himſelf the perils of the ſea, and the other compenſates him by a ſhare of the profits of the adventure. But, except in this reſpect, this contract has no reſemblance to a regular partnerſhip, having in it no community of capital, no community of loſs. (*c*)

Not now in uſe in this country.

Formerly the practice of borrowing money on bottomry and reſpondentia was more general in this country than it is at preſent. The immenſe capitals now engaged in every branch of commerce, render ſuch loans unneceſſary; and money is now ſeldom borrowed in this manner, but by the maſters of foreign ſhips who put into our ports in need of pecuniary aſſiſtance to refit, to pay their men, to purchaſe proviſions, &c. Sometimes officers and others belonging to ſhips engaged in long voyages, who have the liberty of trading to a certain extent with the proſpect of great profit, but without capitals of their own to employ in ſuch trade, take up money on reſpondentia to make their inveſtments: But even this, as I am informed, is now not very frequently done in this country.

This

(*a*) *Pothier*, h. t. n. 46; *Valin.* on art. 16, h. t.; *Emerig.* t. 2, p. 505.—(*b*) *Emerig.* t. 2, p. 397.—(*c*) *Sav.* Dict. h. t. *Caſaregis*, diſc. 7, n. 2; *Emerig.* t. 2. p. 394.

This contract, which muſt always be in writing, is ſometimes made in the form of a deed poll, called a bill of bottomry, executed by the borrower, (*a*) ſometimes in the form of a bond or obligation, with a penalty. (*b*) But whatever may be its form, it muſt contain the names of the lender and the borrower, thoſe of the ſhip and the maſter; the ſum lent, with the ſtipulated marine intereſt; the voyage propoſed, with the duration of the riſk which the lender is to run: It muſt ſhew whether the money be lent on the ſhip, or on goods on board, or on both; and every other ſtipulation and agreement which the parties may think proper to introduce into the contract. (*c*)

It is uſually either in the form of a deed poll or a bond.

It is eſſential to this contract that the marine intereſt be expreſsly reſerved in it. (d) Straccha, (e) indeed, holds that, without this, the law would look upon the contract only as a ſimple loan, upon which the lender had gratuitouſly taken upon himſelf the perils of the ſea. *Emerigon,* however, holds (*f*) that this being a contract founded in good faith, equity will ſupply the omiſſions occaſioned by miſtake or inadvertence; and that, as the lender ſubjects himſelf to the perils of the ſea, and the borrower reaps the fruits of the adventure, commutative juſtice requires that the former ſhould receive, beſide the legal intereſt of his money, a ſatisfaction for the riſk he has run.

The marine intereſt muſt be expreſsly reſerved in it.

Whether equity would ſupply the omiſſion of this.

(*a*) Vid. Append. No. VI.—(*b*) Vid. Append. No. VII.—(*c*) Vid. *Pothier,* h. t. n. 30; *Emerig.* t. 2, p. 402.—(*d*) *Pothier,* h. t. n. 19.—(*e*) Introd. n. 24.—(*f*) T. 2, p. 406.

CHAP.

CHAP. II.

Of the Parties to this Contract.

Who may lend on bottomry.

THE parties to the contract of bottomry are the lender and the borrower. Of the former, it is ſufficient to ſay, that any perſon, who is in a capacity to contract, may lend money on bottomry.

Who may borrow.

With reſpect to the borrower, every perſon who has a veſted aſſignable property in a ſhip or cargo, may, by the general law of merchants, borrow money on bottomry or reſpondentia thereon, to the extent of his intereſt.

When the maſter may hypothecate the ſhip.

This contract ſeems originally to have ariſen from the practice of permitting the maſter of a ſhip, in a foreign country, to hypothecate the ſhip, in caſes of neceſſity, in order to raiſe money to refit. (*a*) And it is eſſential to the ſafety of the ſhip and the ſucceſs of the voyage, that the maſter, in the abſence of the owners, ſhould have this power, which is, indeed, by the marine law, implied in his appointment. (*b*)

He can only do this in the abſence of the owners.

But as the owners are preſumed to give entire authority to the maſter, only in their abſence, and for ſuch affairs as they cannot themſelves conveniently tranſact, he is not in fact maſter till after he ſets ſail. Till then, he is ſubject to their orders, and they have the power of diſmiſſing him at pleaſure; till then, therefore, he can tranſact no buſineſs of importance, but under their immediate directions. (*c*) Hence, if the maſter borrow money on bottomry in the place where the owners reſide, without their expreſs authority, it can only affect his own intereſt on board.

Yet, if money borrowed where the owners reſide be laid out on the ſhip, the owners ſhall be liable for it.

Yet, it is ſaid that, if the money thus borrowed be beneficially employed in ſupplying the neceſſities of the ſhip, and in diſcharge of the owners, they are liable for the money thus laid out. (*d*) But this liability muſt be underſtood as for money paid for their uſe, not upon the contract of bottomry.

Even

(*a*) Vid. 2 *Bl.* Com. 458.—(*b*) Per *Holt*, C. J. in *Bernard* v. *Bridgeman*, Hob. 12.—(*c*) Conſolato del mare, ch. 236.—(*d*) *Vinnius*, ad. ff. de exercit. § 4, p. 844.

Even in a foreign country, and in the abſence of the owners, the maſter cannot take up money on bottomry, for any debt of his own, (*a*) but only for the uſe of the ſhip, in caſes of neceſſity; and this muſt appear in the written contract, otherwiſe the lender will neither have a *lien* on the ſhip, nor an action againſt the owners. The maſter in ſuch caſe would be alone liable, though it ſhould appear that the money was ſpent in ſupplying the neceſſities of the ſhip. (*b*) Hence it would ſeem that originally the lender was bound to ſee to the application of the money advanced by him, and that he was obliged to prove this, to entitle himſelf to recover againſt the owners. But, as the law now ſtands, if it appear that the money has been fairly and regularly lent to ſupply the neceſſities of the ſhip, the miſapplication of it by the maſter will not affect the claim of the lender, who will have his action againſt the owners and his *lien* on the ſhip, without proving that the money was properly applied. He has no reaſon to miſtruſt the maſter, whom the owners have employed. But if he be an accomplice in any fraudulent miſapplication of the money, the owners may impeach the contract upon that ground. (*c*)

Even in a foreign country the maſter can only borrow money in caſe of neceſſity.

And this muſt appear in the contract.

But the lender is not bound to look to the due application of the money.

In a former part of this work, (*d*) it was ſhewn that no *Britiſh* ſubject can legally trade with the enemies of the ſtate in time of war; and that even an inſurance upon ſuch trading is void. It was alſo ſhewn that the inſurance of the ſhips and effects of the enemy has, on ſeveral occaſions, been prohibited by ſtatute; and many arguments and authorities have been adduced to prove that, even at common law, ſuch inſurances are illegal. It is needleſs to repeat thoſe arguments here, every one of which applies with equal, if not greater, force, to prove that the lending of money to the enemy upon bottomry is illegal, if not highly criminal.

Whether money may be legally lent on bottomry to an enemy in time of war.

CHAP.

(*a*) *Molloy*, b. 2, c. 2, § 4. Laws of *Oler.* art. 1, 22.—(*b*) ff. de exercit. art. 7, *Vinnius*, ad id. *Emerig.* t. 2, p. 434.—(*c*) *Loccen.* l. 2, c. 6. n. 12. *Emerig.* t. 2, p. 441.—(*d*) Sup. 70.

CHAP. III.

Of the Thing hypothecated.

Money may be lent on whatever may be inſured.

IT is a general rule that money may be lent on bottomry or reſpondentia, on whatever may be the ſubject matter of inſurance. It may be lent on the body, tackle, furniture, and proviſions of the ſhip, or upon all, or any part of the cargo; or upon both ſhip and cargo. (*a*)

The borrower may take the money on board with him.

But money may be borrowed on reſpondentia *without* hypothecating any thing. The borrower may, and frequently does, take the money on board with him in ſpecie, in order that he may employ it in trade in the courſe of the voyage; which, as has been already obſerved, (*b*) was probably the original intention of ſuch loans.

But the money, or its equivalent muſt be expoſed to the perils of the ſea, at the riſk of the lender.

But it is of the eſſence of this contract that the money lent, or ſomething equivalent to it, be expoſed to the perils of the ſea, at the riſk of the lender. And the ſame reaſons of policy which forbid gaming inſurances equally apply to wagers in the form of bottomry loans. If the borrower has no effects on board; or having ſome, he borrows much beyond their value, and agrees to pay a high marine intereſt, this will afford a ſtrong ground to ſuſpect fraud, and that the voyage will have an unfortunate end. *Cum capitaneus, ad cambium receperit longe majorem pecuniæ ſummam quam fuerit riſicum ſuper navi exiſtens, præſumi debet ſiniſtrum fuiſſe doloſum.* (*c*)

This practice reſtrained by ſtat. 2 *C.* II. c. 11.

Our legiſlature long ſince found it neceſſary to reſtrain the miſchiefs reſulting from this practice, and therefore by ſtat. 16 C. II. c. 6, re-enacted and made perpetual by the ſtat. 22 C. II. c. 11, § 12, after reciting that, "Whereas

(*a*) *Pothier*, h. t. n. 9.—(*b*) Sup. 634.—(*c*) *Caſaregis*, diſc. 62, n. 7; Vid. *Le Guidon*, ch. 19, art. 10.

"Whereas it often happeneth that maſters and mariners "of ſhips having inſured or taken upon botttomry, greater "ſums of money than the value of their adventure, do "wilfully caſt away, burn, or otherwiſe deſtroy the ſhip "under their charge, to the merchants and owners "great loſs;" for the prevention thereof for the future, enacts, 'That if any captain, maſter, mariner, or other 'officer belonging to any ſhip, ſhall wilfully caſt away, 'burn, or otherwiſe deſtroy the ſhip unto which he be-'longeth, or procure the ſame to be done, he ſhall ſuffer 'death as a felon.'

Wagers, in the form of bottomry contracts, are permitted in ſome parts of *Italy*. They are prohibited in *France*.

At *Leghorn* and ſome other parts of *Italy*, where gaming inſurances are tolerated, wagers in the form of bottomry contracts are alſo allowed. (*a*)—In *France*, it was the wiſe policy of the framers of the famous ordinance of 1681, to prohibit all gaming and wagering upon the events of the maritime adventure; and therefore they did not only forbid all gaming inſurances, but alſo all wagers in the form of bottomry contracts. It is therefore provided (*b*) that, in caſe of loſs, the borrower upon goods ſhall not be diſcharged without proving that he had goods on board at the time of the loſs, on his own account, to the amount of the ſum lent.

And this ſpecies of gaming coming into uſe in *England*, the 19 *G.* II. c. 37, § 5, directs that, upon *Eaſt India* voyages the money ſhall only be lent on the ſhip or goods on board, with benefit of ſalvage to the lender.

In *England* it was not unuſual, before the ſtat. 19 *G.* II. c. 37, for perſons to borrow money *on the voyage*, as it was called; that is, where the borrower, having nothing, either in the ſhip or cargo which he could hypothecate, took up money on his own perſonal credit, and on the credit of his ſureties, if he had any. The money thus borrowed was often taken on board, and uſually employed in ſome commercial adventure depending on the ſucceſs of the voyage; and therefore this might generally be conſidered as a legitimate loan upon reſpondentia. But the ſpirit of gaming having availed itſelf of this form of contract to cover wagers, particularly in long voyages, the ſtat. 19 *G.* II.

(*a*) *Caſaregis*, diſc. 14, 15.—(*b*) Ord. de la mar. h. t. art. 3, 14; Vid. *Emerig.* t. 2, p. 496, 500; *Valin*, on art. 3, 14, h. t.

II. c. 37, after prohibiting inſurances without intereſt, declares (§ 5.) 'That all money lent on bottomry or at reſpondentia, upon any ſhip or ſhips belonging to any of his Majeſty's ſubjects, bound to or from the *Eaſt Indies*, ſhall be lent only on the ſhip, or upon the merchandizes on board, and ſhall be ſo expreſſed in the condition of the bond; and the benefit of ſalvage ſhall be allowed to the lender, who alone ſhall have a right to make inſurance on the money ſo lent; and in caſe it ſhall appear that the value of his ſhare in the ſhip, or the effects on board, does not amount to the full ſum or ſums he has borrowed as aforeſaid, ſuch borrower ſhall be reſponſible to the lender for ſo much of the money borrowed as he has not laid out on the ſhip or merchandize laden thereon, with lawful intereſt for the ſame, in the proportion the money laid out ſhall bear to the whole money lent, notwithſtanding the ſhip or merchandize ſhall be totally loſt.'

Whether a wager, in the form of a bottomry loan, be a legal contract at common law.

It is ſaid (*a*) that, as *Eaſt India* voyages only are mentioned in this act, and that as *expreſſio unius eſt excluſio alterius*, it follows that bottomry loans, where the borrower has nothing on board, may be legally made in all other caſes, as at common law, except in the caſes prohibited by the ſtat. 7 *G.* II. c. 21, § 2. (*b*)

It is certainly not a little ſingular that the ſame legiſlature which thought it neceſſary to prohibit ſuch loans upon *Eaſt India* voyages, ſhould not have thought the ſame prohibition equally neceſſary in all other caſes. Yet, I cannot, in this caſe, admit the application of the maxim, *expreſſio unius eſt excluſio alterius*. If, indeed, the maxim were, *excluſio unius eſt recognitio alterius*, it might be more applicable. But ſuch a maxim would have the effect of proving, that a ſtatute which ſhould be made to reſtrain one particular abuſe, would ſanction all others of the ſame nature; which is manifeſtly abſurd.

(*a*) *Park*, 411.—(*b*) Vid. inf. 643.

ſurd. But, be this as it may, ſuch an inference is not ſufficient to prove that a ſpecies of gaming ſo miſchievous in its tendency had ever been ſanctioned by the common law. Nothing ſhort of a ſolemn deciſion of one of the ſupreme courts of *Weſtminſter*, could give to ſuch doctrine the ſtamp of authority; and I believe there has not yet been ſuch a deciſion.

Many *Britiſh* ſubjects having, in the reign of *George* I., fitted out ſhips and clandeſtinely traded to the *Eaſt Indies* under colour of foreign commiſſions, the ſtat. 7 *G.* I. c. 21, § 2, made to reſtrain theſe practices, and to protect the monopoly of the *Eaſt India* company, amongſt other regulations declares, 'That all contracts and agreements, 'made or entered into by any of his majeſty's ſubjects, 'or any perſon or perſons in truſt for them, for the loan 'of any money by way of bottomry, on any ſhip or ſhips 'in the ſervice of foreigners, and bound to, or deſigned 'to trade in, the *Eaſt Indies*, ſhall be void.'

The ſtat. 7 *G.* I. c. 21, prohibits the lending money on bottomry on foreign *Eaſt India* ſhips.

It is ſaid (*a*) that this act does not mean to prevent the king's ſubjects from lending money on bottomry on foreign ſhips, trading to their own ſettlements in the *Eaſt Indies*; and it muſt be owned that, from the preamble to the act, it would ſeem that it had only in view to reſtrain the illegal commerce of *Britiſh* ſubjects with the *Eaſt Indies*, without any reference to that of foreigners; yet the above clauſe expreſsly, and in the moſt unqualified terms, reſtrains the lending of money on bottomry on *any* ſhip or ſhips *in the ſervice of foreigners*. (*b*) Whether a ſhip, the property of *Britiſh* ſubjects, fitted out by them, and laden with their merchandize, can be ſaid to be *in the ſervice of foreigners*, merely becauſe ſhe is furniſhed with a commiſſion from a foreign ſtate, is a queſtion upon which there has not been yet any judicial deciſion.

Whether this act reſtrains the lending of money to foreigners trading to their own ſettlements in *India*.

In the year 1789, an action was brought in the court of Common Pleas, on a reſpondentia bond, executed by the defendant, an *American*, to ſecure the payment of a cargo

It would ſeem that a reſpondentia bond for money lent by a *Britiſh* ſubject, upon goods on board an *American* ſhip, on a

(*a*) *Park*, 412.—(*b*) Vid. ſup. 631.

CHAP. IV.

Of the Principal, and Marine Intereſt.

Of what the loan may conſiſt.

TO conſtitute this contract, one party muſt lend the other a ſum of money upon the uſual conditions. Not that this contract could only be made upon a loan of money; for, as a loan, it may conſiſt, according to the *Roman* law, of all thoſe things *quæ pondere, numero, et menſurâ conſtant, et quæ uſu conſumuntur.* (*a*) In practice, however, ſuch loans are ſcarcely ever made but in money. (*b*) *Emerigon*, indeed, mentions an inſtance of a loan of ſix dozen of *Morocco* ſkins, which were lent on *reſpondentia*, and a ſecurity given for the ſum at which they were valued, with marine intereſt at *cent. per cent.* (*c*)

The principle upon which marine intereſt is allowable.

Bottomry, as has been already obſerved, differs from a ſimple loan in this, that, in the latter, the borrower takes the riſk upon himſelf, and muſt repay the money at all events; whereas the lender on bottomry takes on himſelf the riſk ariſing from the dangers of the ſea, and is only to be repaid in the event of a ſafe arrival. He may therefore legally ſtipulate that, in the event of a ſafe arrival, he ſhall be paid, beſide the ſum lent, not only a compenſation for the *uſe* of his money, but alſo the price of the riſk. And it is impoſſible to fix any rule by which this can be preciſely aſcertained, it muſt in all caſes be ſettled by the agreement of the parties. (*d*) *Trajectitia pecunia, propter periculum creditoris; quamdiu navigat navis infinitas uſuras recipere poteſt.* (*e*) *Juſtinian*, however, after prohibiting the *centeſima* (which was one *per cent. per* month, or twelve

(*a*) ff. l. 2, de reb. cred. § 1.—(*b*) *Pothier*, h. t. n. 8.—(*c*) *Emerig.* t. 2, p. 412.—(*d*) Vid. *Pothier*, h. t. n. 2.—(*e*) *Paul.* ſent. 3, 11, 14.

it permitted by the *French* law to borrow money on bottomry on the profits expected upon goods, becauſe profit is uncertain, and has no phyſical or ſubſtantial exiſtence on board. (*a*)

Seamen may undoubtedly borrow money on any goods they may have on board; becauſe, as far as relates to ſuch goods, they are in the ſame ſituation as thoſe of any other ſhipper. As to their *wages*, the ſame reaſons of policy, drawn from the neceſſity of intereſting them in the preſervation of the ſhip, which prohibit their being inſured, equally forbid their borrowing money on them. (*b*)

Seamen may borrow money on their goods on board; but not on their wages.

Whether money may be lent on a ſhip or goods already expoſed to the perils of the ſea, is a queſtion upon which ſome learned men have differed.—*Valin* (*c*) holds, that it makes no difference whether the loan be made before the ſhip's departure or afterwards; becauſe, ſays he, the preſumption is, either that the money has been uſefully employed in the things put in riſk, or in paying what was due on that account.—*Emerigon*, (*d*) on the contrary, ſuppoſes that the original idea of bottomry was, that the money borrowed ſhould be beſtowed on the ſhip, or veſted in goods for exportation; (*e*) and that, upon this principle, this ſpecies of loan has been permitted and encouraged: But that, as ſoon as the ſhip ſets ſail, the motive to this ceaſes; and a loan, after the ſhip's departure, could not be ſaid to have purchaſed the goods already expoſed to the perils of the ſea.—This is plauſible, but *Valin*'s reaſoning ſeems the moſt ſatisfactory.

Whether money may be lent on a ſhip or goods already in riſk.

CHAP.

(*a*) Ord. de la mar. h. t. art. 4, *Pothier*, h. t. n. 14. *Emerig.* t. 2, p. 480. Vid. ſup. 78. Vid. *Bynk.* quæſt. jur. priv. lib. 4, c. 5, in which he cites a deciſion of the ſenate of *Rotterdam*, to ſhew that *lucrum quod ſperatur, per leges nauticas, aſſecurari non poſſe.*—(*b*) *Emerig.* t. 2, p. 480.—(*c*) On art. 16, tit. *de la ſaiſie*, t. 1, p. 346.—(*d*) Tom. 1, p. 484.—(*e*) Trajectitia ea pecunia eſt quæ trans mare vehitur:—Sed videndum an merces ex eâ pecuniâ comparatæ, in eâ cauſâ habeantur; et intereſt, utrum etiam ipſæ, periculo creditoris, navigent; tunc enim trajectitia pecunia fit. ff. de naut. fœn. 1.

menced; and the borrower, like the inſuréd, may, at his pleaſure, by giving up the voyage propoſed, or by not ſhipping the goods on which the money was lent, prevent its ever taking effect. For, however it may have happened, that the riſk was never commenced, it is ſufficient that this has happened, to turn the contract into a ſimple loan, at common intereſt. The marine intereſt can only be due in reſpect of the principal having been actually put in riſk; nothing elſe can give the lender a legal claim to it. And this is ſo, even where the borrower covenants to perform the voyage mentioned in the contract within a limited time. (*a*)

De Guilder v. *De Peiſter*, 1 *Vern.* 263.

Therefore, where the borrower was bound, *in conſideration* of 400 l., the ſum lent, to perform the voyage mentioned in the bond, within ſix months; and alſo, at the expiration of that time, to pay the 400 l. and 40 l. premium, in caſe the veſſel arrived ſafe; and it happened that the ſhip never ſailed on the voyage, whereby the bond became forfeited.—The borrower brought his bill in equity to be relieved; and it was there decreed, that, as there had been no hazard of loſing the principal, the lender muſt give up the premium, and be content with his principal and *ordinary intereſt*.

What allowance ought to be made to the lender, where the riſk has not been commenced.

To the ſimple intereſt payable, in ſuch caſes, on the ſum borrowed, *Valin*, (*b*) by analogy to the practice in caſes of inſurance, holds that one half *per cent.* upon the marine intereſt, ought to be paid by the borrower who has failed in the contract, in caſe the lender has inſured his principal.—*Emerigon* (*c*) approves this; but adds, that if the borrower be not in fault, it will be ſufficient to repay the ſum lent, with the ordinary intereſt. To me it ſeems but reaſonable that the lender ſhould, in every ſuch caſe, receive not only his principal and intereſt, but alſo one half *per cent.* upon the marine intereſt, and all charges of inſurance.

In

(*a*) *Pothier*, h. t. n. 38, 39; *Valin* on art. 15, h. t.; *Emerig.* t. 2, p. 494.—(*b*) On art. 15, h. t.—(*c*) Tom. 2, p. 496.

In general, as ſoon as the riſk ceaſes, (*diſcuſſo periculo,*) either by the ſhip's ſafe arrival, the expiration of the term, or any other event, the marine intereſt ceaſes, and the debt becomes abſolute. From that time, if the borrower delays payment, it bears only ordinary intereſt. *(a)*

When the riſk ceaſes, the marine intereſt ceaſes.

If the contract be for a certain number of months, either at a ſpecific ſum, or at ſo much *per* month, and ſo at that rate, for any longer time, not exceeding a fixed period; and the voyage be performed within the period firſt limited, the marine intereſt for the whole of that period, will nevertheleſs be due: But if it exceed the latter period, the riſk of the lender will ceaſe, and the debt become abſolute, though the voyage ſhould not be ended. *Poſt diem præſtitutam, et conditionem impletam, periculum eſſe creditoris deſinet. (b)*

When the time of the riſk is limited, the riſk and the marine intereſt will end with the time, tho' the voyage be not ended.

And this holds, even where the ſhip has been prevented by inevitable accident, from performing her voyage within the time limited.—As where money was lent on bottomry, with a condition, that if the ſhip, which was bound to the *Eaſt Indies*, ſhould return to *London* within 36 months, or if ſhe ſhould not return within that time, and ſhould not be taken or loſt within that time, the money to be paid, &c. *The ſhip was detained at* Surat *in* India, *by an embargo laid by the* Mogul, *till after the* 36 *months were elapſed, and in her return home was taken;* ſo that the bond was forfeited. But there being no fault in the maſter, and the voyage being thus delayed by inevitable accident, the borrower brought his bill to be relieved againſt the penalty of the bond.—But Lord *Harcourt*, Ch. ſaid,—"I cannot relieve in this caſe, againſt the expreſs agreement of the parties.—If the lender has inſured this money upon the ſhip, the borrower ſhall have the benefit of the inſurance, upon allowing the lender the charges of the inſurance, and paying him the money in three months."

And the riſk of the lender will ceaſe, tho' the ſhip was prevented by inevitable accident from performing her voyage within the time limited.

Ingledew v. *Foſter*, 4 *Vin.* Ab. 281.

Emerigon

(*a*) ff. de naut. fœn. 4.—(*b*) ff. ut. ſup.

If the marine intereſt be agreed to be paid for the firſt ſix months, though the ſhip ſhould be loſt; whether this be a legal contract.

Emerigon puts a caſe, where it is ſtipulated that 12 *per cent.* ſhall be paid for the firſt ſix months; and that this ſhall be payable, *though the ſhip ſhould be afterwards loſt.* And he ſeems to be of opinion that, if the ſhip be loſt after the ſix months, the lender is not entitled to the ſix months' intereſt.—He ſays that if the borrower had remitted the intereſt for the firſt ſix months, the lender might fairly receive it; but that, if he ſhould not, from the profits of his trade, have been enabled to do this, he would be diſcharged from all obligation. (*a*)—This diſtinction is founded on principles much too vague and indefinite to be received as law. With us, the contract would not be uſurious, becauſe the ſum lent would be put in hazard; and being legal, it would be binding upon the borrower, whatever might be the ultimate ſucceſs of the adventure. In ſuch a caſe, the firſt ſix months would be conſidered as a diſtinct riſk.

Common intereſt begins to run on the principal, as ſoon as the riſk ends.

If, when the ſea-riſk is ended, the borrower delays payment, the common intereſt begins to run, *ipſo jure*, without any demand. *Diſcuſſo periculo majas legitimâ uſurâ non debebitur.* (*b*) But this intereſt runs only on the principal, not on the marine intereſt; for this would be intereſt upon intereſt: *Acceſſio acceſſionis non eſt.* (*c*)

CHAP.

(*a*) *Emerig.* t. 2, p. 518.—(*b*) ff. de naut. fœn. 4.—(*c*) *Pothier*, h. t. n. 51; *Emerig.* t. 2, p. 414.

CHAP. V.

Of the Perils or Riſks to which the Lender is liable.

It is eſſential to this contract, that the lender run the ſea-riſk.

IT is eſſential to this contract, not only that the money be lent on a ſhip or goods, but likewiſe that theſe be expoſed to the perils of the ſea, at the riſk of the lender; that is, that the repayment of the ſum lent, and the marine intereſt, ſhall depend on the ſafe arrival of the ſhip. (*a*) The perils of the ſea, in a large ſenſe, comprehend all thoſe accidents and misfortunes to which ſhips at ſea are expoſed, and which no human foreſight or precaution can avert or reſiſt; *Vis divina, quæ præcaveri, & cui reſiſti, non poteſt.* This idea ſeems to be very fully expreſſed in the uſual terms of our bottomry and reſpondentia contracts; by which it is provided that, '*if, in the courſe of the voyage, and within the time preſcribed, an utter loſs of the ſhip, by fire, enemies, men of war, or any other caſualties, ſhall unavoidably happen,*' the bond ſhall be void, and the borrower diſcharged. So that the perils to which the lender is expoſed, are nearly the ſame as thoſe to which the underwriters upon a policy of inſurance are liable. (*b*)

The perils are nearly the ſame as in inſurance.

A loſs by pirates is within the contract.

Though a loſs by pirates is not uſually expreſſed in bottomry or reſpondentia ſecurities; yet this a riſk within the meaning of the words; piracy being one of the *caſualties* to which ſhips at ſea are liable. (*c*)

But

(*a*) *Pothier*, h. t. n. 16, 38.—(*b*) Vid. *Le Guidon*, ch. 18, art. 2. *Valin* on art. 11, h. t. and on art. 6, tit. *des aſſurances*; *Pothier*, h. t. n. 16. Vid. ſup. 416.—(*c*) R. in *Barton* v. *Wolliford*, *Comb.* 56. But this was not a queſtion upon a bottomry contract, as has been ſuppoſed. *Park* 421. It aroſe in an action on a bill of lading, to which the defendant pleaded

Nothing ſhort of a total loſs will diſcharge the borrower.

But whatever may be the perils to which the lender is liable, nothing ſhort of a total loſs will diſcharge the borrower. The obligation remains, however the goods may be damaged by the perils of the ſea. Nor is there any deduction on account of ſuch damage; for the lender is not bound to contribute to ſimple average or particular damage, unleſs by expreſs agreement. In this reſpect, the lender on bottomry is in a better ſituation than an inſurer, who is obliged to indemnify the inſured, to the extent of the ſum inſured, from all damage ariſing from any of the perils inſured againſt. A capture, therefore, to have the effect of diſcharging the borrower, muſt be ſuch a taking and detention as would amount to a total loſs in a caſe of inſurance: A mere temporary detention will not diſcharge the borrower, unleſs the voyage be thereby loſt.

A ſhip is captured and detained for a month, recaptured and carried to a port out of the courſe of the voyage, reſtored on payment of ſalvage, and at laſt arrives at her port of deſtination: The borrower is not diſcharged.

Joyce v. *Williamſon*, B. R. Mich. 23 G. III. MS.

Thus:—An action was brought on a bottomry bond, on a voyage from the *Tagus* to *New York*; and the condition of the bond was, that if, upon the ſhip's arrival at *New York*, the defendant ſhould pay the plaintiff the ſum lent, with the ſtipulated intereſt; or if the ſhip ſhould be loſt, taken by the enemy, miſcarry, or be caſt away, the bond to be void, otherwiſe to remain in force.—The defendant pleaded, 1ſt. *Non eſt factum*; 2dly. That the ſhip did not arrive ſafe at *New York*; 3dly. That the ſhip was captured by the enemy.—Iſſue was joined upon the two firſt pleas; and to the third the plaintiff replied re-capture. Iſſue being joined on this replication, it appeared upon the trial, that the ſhip was taken on her paſſage to *New York*, detained for a month, and plundered of her ſtores; that ſhe was then retaken by an *Engliſh* privateer, and carried into *Halifax*; where the court of admiralty decreed that ſhe ſhould be reſtored to the original owners, on payment of ſalvage, which was raiſed

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pleaded piracy; and upon demurrer to this plea, it was contended, that robbery is no more an excuſe to a maſter of a ſhip than to a common carrier: But the court held that piracy was an excuſe in this caſe, being one of the dangers of the ſeas.

raiſed by ſale of part of the cargo; that after a conſiderable repair there, ſhe ſailed for *New York*, where ſhe arrived with the remainder of her cargo, and earned her freight: That the ſhip and freight were then worth the ſum mentioned in the bond; but not worth that ſum, and the ſum laid out in repairs.—There was a verdict for the plaintiff, and the court, upon a motion for a new trial, determined that the verdict was right, and the plaintiff entitled to recover.—Lord *Mansfield*, in delivering the opinion of the court, ſaid,—"It is clear that, by the law of *England*, upon a bottomry contract, there is *neither average nor ſalvage*. It has been contended on the part of the defendant, that this caſe is within the ſaving words, that, in caſe of loſs by *capture*, the bond ſhould be void; and that here was a capture and detention for a month. But, upon conſideration, we are all of opinion, that a taking, within this condition, does not mean a temporary taking, which is only an obſtruction which may laſt for a day, it muſt be ſuch a taking as, between inſurer and inſured, would amount to a *total loſs*. But this was not ſuch a capture. The voyage was not loſt; for the ſhip arrived at her port of deſtination and earned her freight: And as freight depends on the ſafety of the ſhip, the ſhip muſt have *arrived ſafe* to have earned her freight. Either way there muſt be a hardſhip; but the law allows no average or ſalvage in bottomry bonds."

The lender is not liable for loſs proceeding from the internal defect of the thing, unleſs by expreſs ſtipulations.

No loſs will have the effect of avoiding the contract, or diſcharging the borrower, but a total loſs proceeding from the perils of the ſea, during the voyage, and within the time ſpecified in the contract. *Creditor ſubit periculum navigationis in caſibus fortuitis tantum.* (a) But no loſs ſhall be reputed to have ariſen from the perils of the ſea, which aroſe from the internal defect of the thing hypothecated. As where a ſhip is not ſea-worthy, and periſhes from age, rottenneſs, or other ſuch cauſe; or where

(a) *Roccus* de navib. n. 51.

where goods periſh of themſelves, liquors run out through the defect of the caſks; dry goods heat and ferment by length of time, (*a*) &c. *Valin*, (*b*) ſeems to condemn, as illegal, any clauſe by which the lender is made liable for loſs occaſioned by the internal defect of the thing. But *Emerigon* (*c*) holds, that the lender may, by expreſs ſtipulation, make himſelf liable for ſuch loſſes, provided the cauſe did not exiſt before the ſhip's departure.

He is not liable for the act of the owners or maſter of the ſhip.

The act of the owners of the ſhip, of the maſter, or of the borrower, is not a peril at the riſk of the lender. *Qui ſuſcipit in ſe periculum navigationis, ſuſcipit periculum fortunæ, non culpæ.* (*d*) As if the voyage be changed by order of the owners of the ſhip; or if a loſs happen by the barratry of the maſter, or by the miſconduct of the merchant; this will not diſcharge the borrower. *Si infortunium vel naufragium, ex culpa debitoris proceſſerit, tunc creditor non tenetur de periculo et damno in quod incurritur, ex culpa vehentis aut alterius.* (*e*) This is the general rule; but, by expreſs ſtipulation, the lender may be made liable for every loſs not occaſioned by the act of the borrower. (*f*)

Nor for a loſs by ſmuggling, unleſs he was privy to it.

If the ſhip be forfeited, or the goods confiſcated, for ſmuggling, in which the lender had no concern, he is not liable for the loſs; for this does not ariſe from the perils of the ſea, but from the lawleſs avarice and temerity of the borrower. *Non ex marinæ tempeſtatis diſcrimine, ſed ex præcipiti avaritiâ, et incivili debitoris audaciâ.* (*g*)—Yet it is ſaid, that if the lender was privy, and conſenting to the contraband trade in which the money was to be employed, he ſhall be liable for the loſs. *Si ſciente, et conſentiente illo fiat, conſenſus jus facit.* (*h*)—In *England*, if the money were lent to be employed in a trade prohibited by law; the contract would be abſolutely void;

(*a*) Ord. de la mar. h. t. art. 12. *Emerig.* t. 2, p. 509. *Pothier*, h. t. n. 34.—(*b*) On art. 12, h. t.—(*c*) Tom. 2, p. 509.—(*d*) ff. de naut. fœn.—(*e*) *Roccus* ne navib. n. 51.—(*f*) Vid. *Emerig.* t. 2, p. 510.—(*g*) ff. de naut. fœn. 3.—(*h*) *Kuricke*, tit. 6, p. 762. Vid. *Valin* on art. 12, h. t.

void; and the ſum lent could never be recovered from the borrower, even though no loſs had happened. (*a*)

The lender, like an inſurer, is only anſwerable for loſſes which happen within the time and place of the riſk, as ſpecified in the contract. Therefore, if the ſhip deviate from the voyage, without neceſſity, the lender will not be liable, any more than an inſurer, to any loſs that may afterwards happen. (*b*) Upon this ſubject I would refer the reader to the chapter on deviation, in caſes of inſurance; (*c*) the doctrine of which is equally applicable to the preſent ſubject.

If the ſhip do not ſail on the voyage deſcribed, or deviate without neceſſity, the lender will be diſcharged from the riſk.

Our courts, both of law and equity, have adopted the ſame principle in ſeveral inſtances.

Thus:—The plaintiff lent 500 l. upon the hull of a ſhip, and the defendant covenanted to pay, if the ſhip went from *London* to *Bantam*, and returned from thence directly to *London*, within 12 months, 550 l.; if from *London* to *Bantam*, and from thence to *China* or *Formoſa*, and returned to *London* within 24 months, 650 l.; and if ſhe returned not within 24 months, then to pay 5 l. *per* month above the 650 l., till 36 months; and if ſhe returned not within 36 months, then to pay 710 l., unleſs it could be proved that the ſhip was loſt within the 36 months.—The ſhip went from *London* to *Bantam*, and from thence to *Surat* and other parts, and ſo returned to *Bantam*; and in her voyage from *Bantam* to *London*, was loſt within 36 months.—In an action upon the bond; after a ſeries of long and intricate pleadings, the above facts appeared upon demurrer.—The court inclined to think, that, by reaſon of the deviation in going to *Surat*, the plaintiff was diſcharged from the riſk, and therefore entitled to recover; and after time taken to deliberate, they adjudged accordingly. (*d*)

A ſhip is loſt after a wilful deviation, the lender is not liable.

Weſtern v. *Wildy*, *Skin.* 152.

So, where, to an action upon a bottomry bond, the defendant pleaded, that the ſhip went from *London* to *Barbadoes*,

If the ſhip be preſſed into the King's ſervice, this will excuſe a deviation; but if the borrower allege a deviation, this

(*a*) Vid. ſup. book 1, ch. 3, § 1, 2.—(*b*) *Pothier*, h. t. n. 18. *Emerig.* t. 2, p. 522.—(*c*) Sup. 392.—(*d*) Vid. Anon. 1 Eq. Ca. Abr. 372, 2 Ch. Ca. 130.

must be explicitly denied.

Williams v. *Stedman*, *Skin.* 345; *Holt's* Rep. 126. S. C.

Barbadoes, fine deviations, and afterwards, on her return from *Barbadoes* towards *London*, she was lost *in viagio prædicto*: The plaintiff replied, that the ship, in her return, went from *Barbadoes* to *Jamaica*; and that after a stay there, she sailed from *Jamaica* for *London*, and was lost; and so shews a deviation: The defendant rejoined, that she was pressed into the King's service, and so was compelled to go to *Jamaica*, which is the deviation pleaded by the plaintiff; *absque hoc*, that she deviated after she was pressed. Upon demurrer to this rejoinder, the plaintiff had judgment.—The court held that the plea of the defendant was not good; for he alleged that the ship went from *London* to *Barbadoes*, without deviation, and that, in her return from *Barbadoes* to *London*, she was lost *in the voyage aforesaid*; but did not shew, *without deviation*. And as the condition was so in express words, the defendant ought to have shewn expressly that he had performed it according to the words.

Changing the ship without necessity, discharges the lender.

So where money is lent on goods, on board a certain ship, the lender is only considered as liable for the risk on those goods while they are on board that ship; and if they be removed to another ship, without necessity, the lender will be discharged. (*a*)—But if the change be occasioned by any necessity, he will still continue liable. As if the first ship be pressed into the king's service, or be declared unnavigable, &c.; the borrower may load the goods on board another vessel at the risk of the lender, and the increase of freight, &c. will be a general average, to which the lender will be liable. (*b*)

Duration of the risk.

Money is generally lent for the whole voyage, outward and homeward; or for either separately; or for a limited time. The contract usually specifies the commencement and end of the risk; and any misfortune happening before or after, is at the risk of the borrower. (*c*) If the voyage be described in the bond; but the

(*a*) *Pothier*, h. t. n. 18; *Emerig.* t. 2, p. 524.—(*b*) *Emerig.* ut sup. Vid. sup. book 1, ch. 11, § 2.—(*c*) Vid. *Valin*, on art. 13, h. t. *Emerig.* t. 2, p. 514.

the time of the commencement and end of the riſk be not ſpecified, the riſk, as to the ſhip, ſhall commence from the time ſhe ſets ſail, and continue till ſhe anchors in ſafety at her port of deſtination; and, as to goods, from the time they are ſhipped, till they are ſafely landed. (*a*)

When the loan upon goods is both for the outward and homeward voyages, the lender continues liable to the riſk during the homeward voyage on the goods, by which thoſe have been replaced on which the money was lent. (*b*)

(*a*) Vid. ſup. book 1, ch. 6, § 5.—(*b*) *Pothier*, h. t. n. 34.

CHAP.

CHAP. VI.

Whether the Lender be liable to general Average.

By the general law of merchants the lender is liable to general average.

THERE is this difference between inſurance and bottomry, that an inſurer, unleſs he ſtipulate to be free of particular average, is always liable to that charge; whereas a lender is not liable to it, unleſs by expreſs ſtipulation: But, by the general law of merchants, in caſe of groſs or general average, the lender ſhall contribute to diſcharge the borrower: (*a*) The reaſon of this difference is, that particular average in no degree contributes to the ſafety of the ſhip; whereas it is to thoſe ſacrifices which are the ſubject of general average, that the lender owes the preſervation of his money, which, without ſuch ſacrifices, would be loſt with the ſhip. (*b*)

The nature of the contract ſeems to require this.

Foreign writers even hold that a ſtipulation on the part of the lender, to be free of general average, would be abſolutely void, as being inconſiſtent with the nature of the contract, contrary to good policy, and injurious to the intereſts of the lender himſelf, who muſt loſe all, if the ſhip be loſt. (*c*) Indeed the nature and object of bottomry contracts, ſeem, of themſelves, to require that the

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(*a*) 'L'argent à profit n'eſt contribuable en aucune avarie, 'reſervé qu' aux rachapts, compoſitions, et jets faits pour la 'ſalvation du total, et pour le ſoulagement ou l'évaſion, des 'dangers.' *Le Guidon*, ch. 19, art. 5.—'Ce qui eſt fort juſte,' ſays *Cleirac* in his commentary on this paſſage, 'afin que cette 'groſſe uſure paſſe au paroiſſe, Penſatio vel *æquamentum periculi*, 'comme dit *Du Moulin* ſur la loi *periculi pretium*. *Dig. De nautico 'fœnore*, en ſon traité, *Contract. uſur.* quæſt. 3 *de trajectitiis*. 'L'argent a profit ne charge pas le navire mais l'affecte par 'hypothéque, laquelle ne ſubſiſte que par la ſalvation d'iceluy; 'c'eſt quoy il eſt raiſonnable que la dite hypothéque contribuë 'à ce qui concerne la conſervation du total, ou de ſon ſujet, *Ut 'omnium in tributione farciatur quod pro omnibus datum eſt.*' Vid. *Pothier*, h. t. n. 42, 47.—(*b*) *Emerig.* t. 2, p. 505.—(*c*) Conſult on this point *Valin*, on art. 16, h. t.; *Pothier*, n. 46; *Emerig.* t. 2, p. 505.

the lender ſhall be liable for general average. The borrower generally takes up the money becauſe he has not a capital of his own upon which he can carry on his trade. Knowing that it would be impoſſible for him to repay the ſum borrowed, but in the event of a fortunate return, he means to run no riſk, and agrees to part with a large ſhare of his profits, to be free from all perſonal reſponſibility. But if he ſhould be held liable to general average, then, by taking up money in this way, he muſt engage in a game of hazard, perhaps without being aware of his danger, in which he may eventually be ruined.

Whether by the law of *England.*

It has been ſaid, however, by a very diſtinguiſhed judge, that, "*by the law of* England, *there is neither average nor ſalvage upon bottomry contracts.*" (*a*) And this doctrine, ſo far as it relates to average, has been ſince adopted by another noble perſon, no leſs eminent for his learning and abilities. (*b*) I have anxiouſly ſought, however, but ſought in vain, to find any decided caſe, or authority in the law, which could warrant this doctrine.—I cannot agree with a learned writer (*c*) on this ſubject, that the ſtat. 19 *G.* II. c. 37, § 5, (*d*) which provides that the benefit of ſalvage ſhall be allowed to the lender, on *Eaſt India* voyages, concluſively proves that there was neither average nor ſalvage upon bottomry contracts at common law.—I never could look upon that act as having introduced any new principle into the law either of inſurance or bottomry contracts. On the contrary, it ſeems to me, after the beſt conſideration I have been able to give the ſubject, that it merely reſtored them to their original and only proper uſe, from which a ſpirit of gaming had been ſuffered to pervert them. I cannot even admit that, becauſe the ſtatute gives the benefit of ſalvage to the lender upon *Eaſt India* voyages, therefore he was not entitled to this at common law. As well might it be ſaid, that becauſe the inſurance of enemy's property, in time of war, has

(*a*) Per Lord *Mansfield* in *Joyce* v. *Williamſon*, ſup. 652.—(*b*) Per Lord *Kenyon* at N. P. in *Walpole* v. *Ewer*, inf. 660.—(*c*) *Park*, 423.—(*d*) Sup. 104.

has been occaſionally prohibited by ſtatute, therefore the inſurance of enemy's property is a legal contract at common law. (*a*)—But even admitting the inference, that becauſe the ſtatute gives the *benefit of ſalvage* to the lender upon *Eaſt India* voyages, therefore he was not entitled to this at common law; does it from thence follow that he was not liable to *general average* at common law? The ſtatute no where mentions general average.

If the inſured upon a reſpondentia intereſt on a foreign ſhip be obliged to contribute to a general average, the underwriters will be liable.

But whatever may be the true rule of law which ought to prevail on this ſubject, it has been determined, that if an inſurance be made in *England* upon a reſpondentia intereſt upon a *foreign ſhip*, and it appear that the lender is liable by the law of the country to which the *ſhip* belongs, to contribute to a general average; the underwriters upon the policy will be liable for ſuch contribution.

Walpole v *Ewer*, at N. P. after Tr. 1789, *Park* 423.

Thus:—Where a reſpondentia loan on a *Daniſh* ſhip and goods was inſured in *England*, and an average loſs was ſuſtained upon the goods to the amount of 61. 15 s. *per cent.* to which the holder of the reſpondentia bond was obliged to contribute. He brought his action againſt the *Engliſh* underwriters to recover the amount of this contribution.—Lord *Kenyon*, who tried the cauſe, ſaid,—"By the law of *England*, a lender upon *reſpondentia* is not liable to average loſſes; but is entitled to receive the whole ſum advanced, provided the ſhip and cargo arrive at the port of deſtination. The plaintiff contends that as, by the law of *Denmark*, ſuch lenders are bound to contribute to average loſſes, according to the amount of their intereſt, the inſurer here muſt anſwer to them. The *Daniſh* conſul has proved that he received a judgment of the court of *Copenhagen*, the decretal part of which proves the law of *Denmark* to be as the plaintiff has ſtated it. The opinions of ſeveral men of eminence in that country have been offered on each ſide: But I reject them, becauſe the ſolemn deciſion of a court of competent juriſdiction is of much greater weight than the opinions

The deciſion of a foreign court of competent juriſdiction is the beſt evidence to ſhew what the law of the country is.

(*a*) See this ſubject fully conſidered, ſup. book 1, ch. 2. § 1.

opinions of advocates, however eminent, or even the extrajudicial opinions of the moſt able judges. - It ſeems as if, in this caſe, the underwriters were bound by the law of the country, to which the contract relates."—The jury found a verdict for the plaintiff. (*a*)

(*a*) Vid. the caſe of *Newman* v. *Cazalet*, *Beawes* lex merc. 349, where an inſured had been obliged by the judgment of a foreign court to pay a larger average contribution than by the law of *England* could have been demanded, but it appeared to have been cuſtomary in adjuſting loſſes to allow the whole of ſuch contributions; Mr. Juſtice *Buller* at N. P. ruled that if the uſage were clearly proved, it ought to govern.

CHAP.

CHAP. VII.

Whether the Lender be entitled to the Benefit of Salvage.

The ſtat. 19 G. II. c. 37, gives the benefit of ſalvage to lenders on *Eaſt India* voyages.

THE proviſion of the ſtat. 19 G. II. c. 37, which gives the benefit of ſalvage to lenders on bottomry and reſpondentia, being confined to *Eaſt India* voyages, it may be proper here to inquire, whether, before that act, the lender, upon any voyage, was entitled to the benefit of ſalvage.

Whether the lender on other voyages be entitled to the ſame benefit.

By the general law of merchants, the event upon which the borrower is diſcharged, is the total loſs of the ſhip or goods upon which the money is lent; provided this happen by the perils mentioned in the contract. Though the borrower is bound to pay the ſum lent and the marine intereſt, in caſe the ſhip or goods on which the money is lent arrive at the port of deſtination, however damaged or reduced in value by the perils of the ſea; yet if part ſhould be captured or loſt, the borrower is only bound to pay in proportion to what remains. (*a*)—Thus, if 1000 l. be lent on goods, the half of which are loſt, the reſt ſaved, the lender will loſe 500 l. of his principal, and the borrower will pay the remaining 500 l. with the marine intereſt upon that ſum. If the ſhip be loſt, but the goods on which the money was lent are all ſaved, the contract will remain in force, and the borrower will be liable, provided another ſhip can be procured to convey the goods to the place of their deſtination. But the charge of the other veſſel will be at the expenſe of the lender, and if no other can be procured, the borrower will be diſcharged on accounting to the lender for the proceeds of the goods ſaved.

But,

(*a*) *Pothier*, h. t. n. 47; *Valin*, art. 11, 14, 17, h. t. *Emerig.* t. 2, p. 453. Conſult on this point *Bynk.* quæſt. jur. priv. lib. 3, c. 16.

But, by the law of *England*, according to the opinion of Lord *Mansfield*, which we have already had occaſion to refer to, (*a*) *there is neither average nor ſalvage upon bottomry contracts*: It muſt be admitted, however, that, without the benefit of ſalvage, this contract muſt partake greatly of the nature of a wager, even when the money is lent upon goods on board of equal value. If there be a total loſs of the ſhip the lender loſes all, though all the goods are ſaved.

Lord *Mansfield*'s opinion againſt it.

(*a*) Sup. 659.

As to the inſurance of bottomry and reſpondentia loans, vid. ſup. 93, 94, 95, 223, 225.

As to the remedy of the lender, where the borrower becomes bankrupt, before the riſk is ended, and the lender entitled to repayment, vid. ſup. 631.

BOOK THE THIRD.

Of Inſurance upon Lives.

CHAP. I.

Of the Nature of this Contract.

Defined. THE inſurance of a life is a contract whereby the inſurer, in conſideration of a certain premium, either in a groſs ſum, or by annual payments, undertakes to pay the perſon for whoſe benefit the inſurance is made, a ſtipulated ſum of money, or an annuity equivalent, upon the death of the perſon whoſe life is inſured, *whenever this ſhall happen*, if the inſurance be for the whole life, or *in caſe this ſhall happen within a certain period*, if the inſurance be for a limited time.

Utility of it. The precarious dependence of a numerous family upon the life of a ſingle perſon, naturally ſuggeſts the idea of ſeeking ſome protection againſt a calamity, which ſooner or later muſt befal them; and this, probably, ſuggeſted the firſt idea of inſurances upon lives, as an expedient by which a pecuniary indemnity, at leaſt, might be ſecured to the ſufferers, ſufficient to reſcue them from the poverty and diſtreſs with which they were threatened.

Upon this principle reſts the utility of inſurances upon lives. Perſons having incomes determinable upon their own lives, or the lives of others, ariſing from landed property, from church livings, from public employments, penſions, annuities, &c. by paying ſuch an annual premium as they can ſpare from their preſent neceſſities, may ſecure to their widows, their children, or other dependants, an adequate ſum of money, or an equivalent annuity, payable upon their deaths. By ſuch inſurances, alſo, may the fines to be paid upon the renewal of leaſes, or upon the deſcent of copyholds, be provided for. So, where

where a perſon, having only a life income, wants to borrow money, but can only give his own perſonal ſecurity for it; he may, by inſuring his life, ſecure to the lender the repayment of his money, though he ſhould die before he is enabled to diſcharge the debt. (*a*)

Eſtabliſhment of the different companies for the inſurance of lives.

Theſe conſiderations induced the Biſhop of *Oxford* and ſeveral other benevolent perſons in the reign of Queen *Anne*, to apply for the charter by which the corporation, called the *Amicable Society*, was eſtabliſhed; to enable perſons to ſubſcribe a part of their incomes, in order that the repreſentative of each ſubſcriber ſhould, upon his death, receive ſuch a ſum as the funds of the corporation would enable them to pay upon the ſeveral deaths happening in each year.

Amicable Society.

But as the benefits of this ſociety were confined to a limited number of ſubſcribers, and thoſe only for ſmall ſums, ſeveral other corporations and companies upon more extenſive plans have been eſtabliſhed. The *Royal Exchange* and *London Aſſurance* companies obtained charters from king *George* I. to enable them to make inſurances upon lives. The Society for *Equitable Aſſurances* on lives and ſurvivorſhips, was eſtabliſhed in the year 1762, by deed enrolled in the court of King's Bench at *Weſtminſter*, in which every perſon who inſures becomes a member, participating in the profit and loſs of the ſociety. The ſucceſs attending this eſtabliſhment has given riſe to two others, namely, the *Weſtminſter Society*, for inſurance on lives and ſurvivorſhips, and granting annuities; and the *Pelican* life inſurance company.

Royal Exchange and *London Aſſurance companies.*

Equitable aſſurance.

Weſtminſter Society.

Pelican Company.

Legality of inſurance on lives.

We are not informed at what time this ſpecies of inſurance was firſt introduced into this country; probably becauſe it came into uſe by ſlow and imperceptible degrees. *Roccus* (*b*) has taken ſome pains to prove that inſurances upon lives are legal contracts. Yet in moſt of the ſtates of *Europe* ſuch inſurances have been prohibited by poſitive law. In this country, however, ſuch contracts have been repeatedly ſanctioned by legiſlative authority, and

(*a*) Vid. inf. ch. 3.—(*b*) De aſſecur. n. 74.

and indeed the legality of them is now indisputable. Perhaps it is in this country alone, that insurances upon lives can be safely tolerated. In *France*, they have always been deemed illegal, (*a*) and they are expressly prohibited by the ordinance of 1681, (*b*) because, say the *French* writers, it is an offence against public decency to set a price upon the life of man, particularly the life of a freeman, which is above all valuation. (*c*)

(*a*) *Le Guidon*, ch. 16, art. 5.—(*b*) Tit. *des assurances*, art. 10.—(*c*) *Valin*, on art. 10. tit. *des assurances*. Vid. sup. 132; *Pothier*, tit. *des assurances*, n. 127.

CHAP.

CHAP. II.

Of the Warranty of the Health and Age of the Life insured.

IT is generally a condition or warranty in insurances upon lives, either inserted in the policy, or contained in a declaration or agreement signed by the insured, that the person whose life is meant to be insured has not any disorder which tends to the shortening of life; that he has, or has not, had the small pox; and that his age does not exceed so many years; that this declaration shall be the basis of the contract between the insurers and the insured; and that, if any untrue averment be contained therein, the contract shall be void, and all money paid on account of the insurance forfeited.

The declaration signed by the insured.

As this declaration is to be taken as part of the written contract, (*a*) amounting to a warranty, it behoves every person who makes an insurance upon a life, to be very circumspect in ascertaining the truth of the allegations contained in it; because upon that the validity of the contract must depend.

By the warranty that the person, whose life is to be insured, *has no disorder which tends to the shortening of life*, is not to be understood that he is perfectly free from the seeds of all disorder. The warranty is sufficiently true if he be in a reasonably good state of health, and, that his life may be insured on the common terms, for a person of his age and condition: And the following case will shew, that though the person labours under a particular infirmity, yet, if it can be shewn that this had no tendency to shorten life, and that, in fact, it did not, in any

A warranty that the party is in good health, will not be falsified by proving that he laboured under a particular infirmity; if this had no tendency to shorten life.

(*a*) See the case of *Routledge* v. *Burrell*, inf. book 4, c. 4.

any degree, contribute to his death, the warranty is sufficiently complied with.

The life insured is warranted in good health at the time of making the policy: It will not falsify the warranty, to prove that, in consequence of a wound, he had a partial palsy in his loins; if this did not tend to shorten life.

Ross v. *Bradshaw*, 1 *Bl.* 312.

Thus:—An insurance was made on the life of Sir *James Ross* for one year, from *October* 1759 to *October* 1760; *warranted in good health at the time of making the policy.*—In an action on this policy, it appeared upon the trial, that Sir *James* had received a wound at the battle of *La Feldt*, in the year 1747, in his loins, which had occasioned a partial relaxation or palsy, so that he could not retain his urine or *fæces*, and which was not mentioned to the insurer. Sir *James* died of a *malignant fever* within the time of the insurance. All the physicians and surgeons who were examined for the plaintiff, swore that the wound had no sort of *connexion with* the fever; and that the want of retention was not a disorder which shortened life; but he might, notwithstanding that, have lived to the common age of man; and the surgeons who opened him said that his intestines were all sound. One physician, who was examined for the defendant said, that the want of retention was paralytic; but being asked to explain, he said it was only a local palsy, arising from the wound, but did not affect life: But, on the whole, he did not look upon him as a good life.—Lord *Mansfield*, who tried the cause, in summing up the evidence to the jury, said,—"No question of fraud can exist in this case. When a man makes an insurance upon a life generally, without any warranty of the state of the life insured, the insurers take all the risk, unless some fraud be committed by the person insuring, either by *suppressing some circumstances, which he knew*, or by *alleging what was false*. But if the insured knew no more than the insurer, the latter takes the risk. Wherever there is a warranty, it must, at all events, be proved that the party was a good life, which makes the question on a warranty much larger than on fraud. Here there was a warranty, and it is proved that there was no representation at all, as to the state of life, nor any question asked about it: Nor was it necessary. Where an insurance is upon a *representation*, every material circumstance

cumſtance ſhould be mentioned; ſuch as age, way of life, &c. But where there is a warranty, then, nothing need be told; but it muſt, in general, be proved, if litigated, *that the life was, in fact, a good one: And ſo it may be, though he had a particular infirmity.* The only queſtion is, whether he was in *a reaſonable good ſtate of health, and ſuch a life as ought to be inſured on common terms.*"—The jury, upon this direction, without going out of court, found a verdict for the plaintiff.

So, where an inſurance was made on the life of Sir *Simeon Stuart*, from the 1ſt of *April* 1779, to the 1ſt of *April* 1780, and during the life of *Eliza Edgley Ewer*. The policy contained a warranty that Sir *Simeon* was about 57 years of age, and in good health when the policy was underwritten, and that Mrs. *Ewer* was about 78 years of age. Upon the trial of the cauſe, the defendant admitted that Sir *Simeon* and Mrs. *Ewer* were of the reſpective ages mentioned in the warranty; that he died before the 1ſt of *April* 1780, and that ſhe was living. Two queſtions were intended to have been made; 1ſt. As to the plaintiff's intereſt; 2dly. On the warranty of health. The former was diſpoſed of by the plaintiff's proving a judgment debt.—As to the latter, it appeared in evidence that, though Sir *Simeon* was troubled with ſpaſms and cramps, from violent fits of the gout, he was in as good a ſtate of health when that policy was underwritten, as he had enjoyed for a long time before. It was alſo proved by the broker who effected the policy, that the underwriters were told that Sir *Simeon* was ſubject to the gout.—Doctor *Heberden*, and other gentlemen of the faculty proved that ſpaſms and convulſions were ſymptoms incident to the gout.—Lord *Mansfield*, who tried the cauſe, ſaid,—"The imperfection of language is ſuch, that we have not words for every different idea; and the real intention of the parties muſt be found out by the ſubject matter. By the preſent policy, the life is warranted, to ſome of the underwriters *in health*; to others, *in good health*; and yet there was no difference, in point of fact: *Such a warranty can never mean, that a man*

Nor will it ſatisfy this warranty to ſhew that the party was troubled with ſpaſms and cramps, from violent fits of the gout.

Willis v. *Poole*, at N. P. after Eaſt. 1780.

a man has not in him the seeds of some disorder. We are all born with the seeds of mortality in us. A man, subject to the gout, is a life capable of being insured, (*a*) if he has no sickness at the time, to make it an unequal contract." There was a verdict for the plaintiff.

If there be no warranty, the insurer takes the risk upon himself; unless there be fraud.

When there is no warranty, the insurer takes the risk upon himself, whatever may be the state of health of the person whose life is insured, unless there be some fraudulent misrepresentation or concealment.

The insured refuses to warrant, but the broker tells the first underwriter, that *from the account he had received, he believed it to be a good life.*—There being no fraud in this the underwriters run all risks.

Thus:—An insurance was made on the life of *Drury Sheppey*, from the 1st of *April* 1777, to the 1st of *April* 1778.—In an action on the policy, the question was, as to the representation of *Sheppey*'s health, at the time the policy was effected. The interest in the life was a debt of 900 l. due from *Sheppey* to the plaintiff. It appeared that *Sheppey*, who had a place in the custom-house of *Ireland*, went to the south of *France*, for the benefit of his health, or to avoid his creditors, and there died within the time limited in the policy. The broker, who effected the policy, told the underwriters, that the gentleman for whom he acted, would not warrant any thing; but *from the account he* (the broker) *had received, he believed it to be a good life.*—Lord *Mansfield*, who tried the cause, said,—"As to the interest, this policy may be considered as a collateral security for the debt due to the plaintiff. When there is no warranty, the underwriter runs the risk of its being a good life or not. If there be a concealment of any knowledge of the state of the life, it is a fraud. It is a rule that every subsequent underwriter gives credit to the representation made to the first; (*b*) and it is allowed that any subsequent underwriter

Stackpool v. *Simon*, at N. P. Hil. Vac. 1779. *Park* 437.

Every subsequent underwriter may give in evidence any representation made to the first.

(*a*) It is now a practice, in most of the offices for insurances upon lives, to require that, in the proposal for every insurance, it shall be stated, whether the person, whose life is to be insured, has ever been afflicted with the gout.—(*b*) Vid. sup. 338.

derwriter may give in evidence a misrepresentation to the first. The broker here does not pretend to any knowledge of his own, but speaks from *information*. (*a*) There is no fraud in him.—The jury found a verdict for the plaintiff.

(*a*) It is not stated, in the above note, from what information he spoke; but if it had appeared that he spoke without any information on the subject, this, I conceive, would have been a misrepresentation that would have avoided the contract. Vid. sup. 335.

CHAP.

CHAP. III.

Of the Intereſt of the Inſured in the Life inſured.

Neceſſity of prohibiting inſurances upon lives, without intereſt.

THE ſpirit of gaming, which is always ready to inſinuate itſelf into every tranſaction, and to aſſume the form of every contract, which depends upon uncertain events, long ſince availed itſelf of inſurance upon *lives*, as affording abundant opportunities for *ſpeculating upon* chances. Wagers came to be daily made upon the duration of men's lives, in the form of inſurances, by perſons who were neither connected with the parties, nor in any manner intereſted in the duration of their lives; nor did the inſurers much concern themſelves to know upon what intereſt, or for what reaſon, ſuch inſurances were made. Such practices were big with miſchiefs of various deſcriptions; nor is it probable that even the lives, thus preſumptuouſly inſured, were always free from danger. The evil, however, at length became apparent to the legiſlature: But it being admitted, that inſurances upon lives, under proper reſtrictions, might, in many inſtances, be highly beneficial to the public, it was determined, that ſuch inſurances ought not to be aboliſhed, but only regulated.

By 14 G. III. c. 48, § 1. Any inſurance made on any life, or other event, wherein the inſured ſhall have no intereſt, ſhall be void.

Therefore, by ſtat. 14 *G.* III. c. 48, § 1, it is enacted, 'That no inſurance ſhall be made by any perſon 'or perſons, bodies politic or corporate, *on the life or* 'lives of any perſon or perſons, or *on any other event or events whatever*, (*a*) wherein the perſon or perſons, for 'whoſe

(*a*) The title of this ſtatute is, 'An act for regulating 'inſurances upon lives, and for prohibiting all *ſuch inſurances*, 'except in caſes where the perſons inſuring ſhall have an in- 'tereſt

'whoſe uſe or benefit, or on whoſe account, ſuch policy or policies ſhall be made, *ſhall have no intereſt, or 'by way of gaming or wagering*: And that every inſurance 'made contrary to the true intent and meaning of this 'act, ſhall be null and void to all intents and purpoſes 'whatſoever.'

And (by § 2,) it is further enacted, 'That it ſhall 'not be lawful to make any policy or policies on the 'life or lives of any perſon or perſons, or other event or 'events; without inſerting in ſuch policy or policies, 'the name or names of the perſon or perſons intereſted 'therein, or for what uſe, benefit, or on whoſe account, 'ſuch policy is ſo made or underwrote.'

And (by § 2,) the name of the perſon intereſted in the event ſhall be inſerted in the policy.

And (by § 3,) it is further enacted, 'That in all 'caſes, where the inſured hath an intereſt in ſuch life 'or lives, event or events, no greater ſum ſhall be re- 'covered, or received from the inſurer or inſurers, than 'the *amount or value* of the intereſt of the inſured in 'ſuch life or lives, or other event or events.'

And (by § 3,) the inſured ſhall recover no more than the *amount or value* of his intereſt.

The fourth ſection contains a proviſo that this act ſhall not extend to inſurances *bonâ fide* made on ſhips or goods.

This act not to extend to marine inſurances.

Very few queſtions have ariſen upon the intereſt of the inſured, in the life inſured.—A *bonâ fide* creditor has undoubtedly an intereſt in the life of his debtor, at leaſt where he has only the perſonal ſecurity of the debtor; and it has been holden by a great authority, that this intereſt is inſurable within the ſtatute.

A creditor has an inſurable intereſt in the life of his debtor.

Thus:—An inſurance was made on the life of Lord *Newhaven*, from the 1ſt of *December* 1792, to the 1ſt of *December*

Anderſon v. *Edie*, at N. P. B. R. Hil. 1795. *Park* 432.

'tereſt in the life or death of the perſons inſured.'—From this title it would ſeem, that the framers of this bill originally intended to confine the operation of it to inſurances upon lives only. But the words, '*or any other event or events what-* '*ſoever*,' introduced both into the enacting parts and the preamble, plainly ſhew that the legiſlature meant, that the regulations of this act ſhould extend to every ſpecies of inſurance, except marine inſurances; to which, by the proviſo in the 4th ſection, it is declared, that it ſhall not extend.

December 1793.—In an action on the policy, the only queſtion made by the defendant was, as to the plaintiff's intereſt in the life inſured, which, it was contended, was not ſufficient to take this caſe out of the above ſtatute. It appeared in evidence, that Lord *Newhaven* was indebted to the plaintiff and a Mr. *Mitchell*, in a large ſum of money; part of which debt had been aſſigned by them to another perſon; the remainder being more than the amount of the ſum inſured, was, upon a ſettlement of accounts between the plaintiff and *Mitchell*, agreed by them to remain to the account of *Mitchell* only.—Lord *Kenyon*, who tried the cauſe, was of opinion, that this debt was a ſufficient intereſt. He ſaid *it was ſingular* that this queſtion had never been *directly decided* before: That a creditor had certainly an intereſt in the life of his debtor; becauſe the means by which he was to be ſatisfied might materially depend upon it; and that, at all events, the death muſt, in all caſes, in ſome degree, leſſen the ſecurity.—The jury found a verdict for the plaintiff.

Whether this ought not to be confined to the caſe where, by the death of the debtor, the creditor muſt loſe his debt.

From the above note of this caſe, though it ſeems to be rather a defective one, it may reaſonably be ſuppoſed that the plaintiff had only Lord *Newhaven's* perſonal ſecurity for the debt, and that with him died all hopes of repayment from his eſtate. Upon this ground I think there could be no doubt but that the creditor had an inſurable intereſt in Lord *Newhaven's* life, to the amount of the debt. But Lord *Kenyon* is ſtated to have ſaid, that, "*At all* "*events, the death muſt, in all caſes, in ſome degree, leſſen* "*the ſecurity.*"—As an abſtract propoſition, this is, in general, true. But it cannot be inferred from this, that his lordſhip meant to lay it down, as law, that every creditor, however his debt may be ſecured, has an inſurable intereſt in the life of his debtor, to the amount of the debt. Lord *Mansfield*, in the caſe of *Stackpool* v. *Simon* (*a*) ſays that a policy may be conſidered as a collateral

(*a*) Sup. 670.

lateral ſecurity for the debt due to the inſured.—And yet it would ſeem, that, even where the creditor has only the perſonal ſecurity of the debtor to rely upon for repayment, the inſurer, before he pays the ſum inſured, might, perhaps, have a right to call upon the creditor inſured, to ſhew that nothing could be recovered from the eſtate of the deceaſed debtor. Where the debt is amply and ſatisfactorily ſecured by mortgage or otherwiſe, the creditor can have but the ſhadow of an intereſt in the life of the debtor. But, by the third ſection of the above act, it is declared, that, '*No greater ſum ſhall be recovered* '*from the inſurer than the amount or value of the intereſt* '*of the inſured in the life inſured.*'—Now, what can be the *amount or value* of the intereſt of the creditor, in the caſe put?—Surely nothing that a jury could eſtimate.

The holder of a note for money won at play has not an inſurable intereſt in the life of the maker.

Be this, however, as it may, no creditor has an inſurable intereſt in the life of his debtor, unleſs the debt be incurred upon a good and legal conſideration. Therefore, in the following caſe, it was ruled, that the holder of a note given for money won at play, has not an inſurable intereſt in the life of the maker of the note.

Dwyer v. *Ellis*, at N. P. after Hil 1788. *Park* 432.

An action was brought on a policy on the life of *James Ruſſell*, from the firſt of *June* 1784 to the firſt of *June* 1785.—By a memorandum at the foot of the policy it was declared, that it was intended to cover the ſum of 5000 l. due from *Ruſſell* to the plaintiff, for which he had given his note payable in one year from the 14th of *May* 1784.—Two objections were made on the part of the defendant; 1ſt. That part of the conſideration for the note, was money won at play; 2dly. That *Ruſſell*, at the time he gave the note, was an infant.—Mr. Juſtice *Buller*, who tried the cauſe, nonſuited the plaintiff, upon the ground that part of the conſideration for the note, being for a gaming tranſaction, there was a want of intereſt in the plaintiff. But as to the objection of the infancy of *Ruſſell*, he ſaid, that the intereſt was contingent; for *Ruſſell* might or might not have avoided the note; and he doubted much whether, till ſo avoided, the note muſt not be taken, as againſt a third perſon, to be the note of

The infancy of the debtor cannot be objected by an inſurer.

of a person of full age; and the maker of the note only could take the objection.

A trustee may insure for the benefit of the *cestuy que trust*.

Tidswell v. Angerstein, Peake 151.

A trustee may insure for the benefit of the *cestuy que trust*.—As where an insurance was made on the life of one *Holden*, from the 17th of *August* 1790, to the 17th of *August* 1791, and during the life of the plaintiff. *Holden* had granted an annuity to the plaintiff's late brother, which annuity he had bequeathed to persons not parties to this insurance, having made the plaintiff executor of his will, and directed him to make insurance.—In an action on this policy, brought by the executor, it was objected that, as the annuity was not devised to him by the grantee, he had no insurable interest in the life of *Holden* the grantor.—But Lord *Kenyon* thought this a sufficient interest in the executor to support the action.

CHAP.

CHAP. IV.

Of the Riſks which Inſurers upon Lives are to run.

A loſs, upon this contract, muſt always be total.

AS, by the terms of this contract, the entire ſum inſured is to be paid upon the happening of one ſingle event, which cannot *partially* happen, and by the happening of which, the inſured muſt ſuffer all the injury againſt which he meant to be protected by the inſurance, the loſs muſt always be total, and never can be partial.

What are the uſual exceptions.

The different inſurance companies annex to the contract certain conditions or exceptions.

The *Royal Exchange Aſſurance* declares every inſurance made by a perſon *on his own life* to be void, if the perſon, whoſe life is inſured, ſhall depart the limits of *Europe*, ſhall die upon the ſeas, or enter into any military or naval ſervice whatſoever, without the previous conſent of the company; or ſhall die by ſuicide, duelling, or the hand of juſtice.

Where the inſurance is made by a perſon, *on the life of another*, death, "*by ſuicide, duelling, or the hand of juſtice*" is not excepted.

The *Weſtminſter Society* adopts the ſame exceptions. The *Equitable Aſſurance*, and the *Pelican Life-Inſurance*, adopt the ſame exceptions, only omitting the word *duelling*, even where the party inſures his own life.

To make the inſurer liable, not merely the *cauſe* of the death, but the death itſelf muſt appear to have happened *within the time limited.*

We have already ſeen that, in the caſe of marine inſurances, not only the *cauſe* of the loſs, but the loſs itſelf, muſt appear to have happened during the continuance of the riſk. (*a*) The ſame principle applies to inſurances upon

(*a*) R. *Lockyer* v. *Offley*, 1 T. R. 252, ſup. 174, 459.

upon lives. And therefore, if a man's life be insured for a year, and some short time before the expiration of the term, he receive a mortal wound, of which he dies *after the year*, the insurer would not be liable. (*a*)

But whether the death happened within the time limited, is always a question of fact.

But where it is uncertain whether the death happened within the time limited, this is a question of fact that must be left to the decision of a jury.

Patterson v. *Black*, at N. P. Hil. Vac. 1780.

Thus:—An insurance was made on the life of *L. Macleane*, Esq. from the 30th of *January* 1772 to the 30th of *January* 1778. In an action on the policy, it appeared, that, about the 28th of *November* 1777, he sailed from the *Cape of Good Hope*, in the *Swallow* sloop of war; which ship, not being afterwards heard of, was supposed to have been lost in a storm off the *Western Islands*.—The question was, whether *Macleane* died before the 30th of *January* 1778. To establish the affirmative of that question, the plaintiff called witnesses to prove the ship's departure from the *Cape* with *Macleane*; and several captains swore that they sailed the same day; that the *Swallow* must have been as forward in her course as they were on the 13th or 14th of *January*, the period of a most violent storm, in which she probably was lost; and that the *Swallow* was much smaller than their vessels, which, with difficulty, weathered the storm.—Lord *Mansfield*, who tried the cause, left it to the jury to say, whether, under all the circumstances, they thought the evidence sufficient to convince them that *Macleane* died before the time limited in the policy; adding, that if they thought it so doubtful as not to be able to form an opinion, the defendant ought to have their verdict.—They found for the plaintiff.

If a policy be to take effect *from the day of the date*, the day of the date is excluded.

Sir *Robert Howard*'s case, 2 *Salk.* 625, 1 Ld. *Ray.* 480.

A question which has often puzzled lawyers, namely; whether a period of time, to commence *from the day of the date*, was inclusive or exclusive of that day, once occurred in an action upon a policy upon the life of Sir *Robert Howard*, for one year, *from the day of the date thereof*, which

(*a*) Per *Willes*, J. in delivering the opinion of the court in *Lockyer* v. *Offley*, 1 T. R. 254.

which was the third day of *September* 1697. Sir *Robert* died on the 3d of *September* 1698, at one o'clock in the morning.—Lord C. J. *Holt* held that, *from the day of the date* excludes the day, but *from the date* includes it; and therefore, the day of the date being excluded in this caſe, the inſurer was held liable. (*a*)

I have now gone through all that ſeemed to be material upon the ſubject of inſurance upon lives; from which it appears that many of the principles which govern marine inſurances are alſo applicable to this contract. Conſidering the great multiplicity of inſurances which have of late years been made upon lives, the number of litigated caſes that have ariſen upon them is extremely ſmall. One principal reaſon is, that the happening of the event inſured againſt is always a fact of eaſy proof, which can ſcarcely ever afford any ſubject of diſpute. Another is the great difficulty of practiſing any fraud in ſuch inſurances. But to no cauſe is this fortunate circumſtance more to be aſcribed than to the honour, integrity, and liberality of the ſeveral companies engaged in this branch of inſurance.

Reaſons why ſo few litigated queſtions have ariſen in inſurances upon lives.

As

(*a*) See the caſe of *Pugh* v. the Duke of *Leeds*, *Cowp.* 714, in which, after great deliberation, it was held that the words *from the date*, and *from the day of the date* mean the ſame thing; and that they are taken to be either incluſive, or excluſive, according to the context, and ſubject matter; and that either meaning ſhall be adopted which ſhall moſt effectually ſupport, not defeat, the intention of the parties.—This may be a very good rule, in the caſes to which it applies: But it would have been of no uſe in the deciſion of the caſe above cited; becauſe the intention of the parties, in that caſe, could only be collected from the policy; and whether they meant to include, or exclude, the day of the date, depended on the conſtruction of the words contained in it. If, therefore, ſuch a caſe were again to occur, it muſt be decided whether the day of the date ſhould be excluded or included; and then, perhaps, Lord *Holt*'s opinion might be thought the beſt authority upon that point.—Such a queſtion, however, is not again likely to ariſe; becauſe it is now the uſual practice to mention the day both of the commencement and end of the policy, and to declare both to be incluſive.

Return of premium.

As to return of premium, no question upon that subject has ever yet, as far as I have been able to learn, occurred in any case of insurance upon lives. If such a question should arise, it must be governed by the same principles which prevail upon that subject in marine insurances.—These will be found under the proper head in the first book. (*a*) Indeed Lord *Mansfield*, on two occasions, exemplified his doctrine, upon the subject of return of premium, by shewing their application to the case of an insurance upon a life. (*b*)

Remedy against the estate of a bankrupt insurer.

With respect to the claim which the insured upon a life shall have upon the estate of the insurer, become bankrupt during the continuance of the life insured; this has been determined to be the same as in the case of marine insurances. (*c*)

(*a*) See book 1, ch. 16, § 2.—(*b*) See his judgment in *Bermon* v. *Woodbridge*, sup. 573, and in *Tyrie* v. *Fletcher*, sup. 576.—(*c*) See the case of *Cox* v. *Leatard*, *Dup.* 166, n. sup. 631.

BOOK

BOOK THE FOURTH.

Of Inſurance againſt Fire.

CHAP. I.

Preliminary Obſervations.

Inſurance againſt fire defined.

BY this contract the inſurer, in conſideration of a certain premium received by him, either in a groſs ſum, or by annual payments, undertakes to indemnify the inſured againſt all loſs or damage which he may ſuſtain in his houſes or other buildings, goods and merchandize, by fire, during a limited period of time.

The time of its introduction into *England* unknown.

I have not been able to aſcertain the period of the introduction of inſurance againſt fire into this country. But it has certainly been in uſe here conſiderably more than a century. Of late years, notwithſtanding a very heavy ſtamp duty impoſed on theſe inſurances, they have been brought into very general, I might almoſt have ſaid univerſal, uſe, in this country; particularly in *London* and other cities and large towns.

Very little in uſe in other countries.

I do not find, however, that this ſpecies of inſurance is much in uſe in other countries. It was not till the year 1754 that it came into uſe at *Paris*. In that year, one of the companies inſtituted there for marine inſurances, obtained from the government permiſſion to make inſurances againſt fire. But they have never, as *Pothier* informs us, become general even at *Paris*. (*a*) In *Holland*, though inſurance againſt fire is not altogether unknown, few people ſeek its protection; perhaps becauſe the people of that country

(*a*) Vid. *Pothier*, tit. *des aſſurances*, n. 3.

country can rely ſo much on their own caution, that they think it unneceſſary to pay for any greater ſecurity. Indeed I have heard it confidently aſſerted, by perſons well acquainted with the cities both of *London* and *Amſterdam*, that after making all fair allowances, there is, upon an average, more property deſtroyed by fire in the former in one year, than in the latter in ſeven.

Whether in a national point of view it be more hurtful than beneficial. The objection to it.

It cannot be denied that this ſpecies of inſurance affords great comfort to individuals, and often preſerves whole families from poverty and ruin. And yet it has been much doubted, by wiſe and intelligent perſons, whether, in a general and national point of view, the benefits reſulting from it are not more than *counterbalanced* by the miſchiefs it occaſions. *Not to mention* the careleſſneſs and inattention which ſecurity naturally creates; every perſon who has any concern in any of the fire offices, or who has attended the courts of *Weſtminſter* for any length of time, muſt own, that inſurance has been the original cauſe of many fires in *London*, with all their train of miſchievous conſequences.

More than counterbalanced by its benefits.

On the other hand, the advocates for this ſpecies of inſurance, though they admit it to have been ſometimes the cauſe of intentional fires; yet they inſiſt, that, even as a national concern, the benefits vaſtly outweigh the miſchiefs which proceed from it. And when we recollect the precautions uſed by the different inſurance companies, to prevent the ſpreading of fires, by providing a number of fire engines, which are kept in conſtant repair, and fit for immediate uſe, not only in all parts of the metropolis, but in every other conſiderable town in the kingdom;—by keeping in conſtant pay, a number of engineers and fire-men, expert in extinguiſhing fires, and porters for the removal of goods;—by employing a number of theſe in patrolling the ſtreets at all hours of the night, in conſtant readineſs to fly to the ſpot from whence any alarm of fire may proceed: When we recollect that the courage, promptitude, and addreſs of theſe people often ſtop the progreſs of the moſt dangerous fires, and thereby reſcue many valuable lives, and immenſe property from

from deſtruction:—When theſe benefits, I ſay, are fairly conſidered, it is impoſſible to deny that they greatly outweigh all the diſadvantages that can be put in the oppoſite ſcale.

The ſeveral fire inſurance companies in *London*.

A conſiderable number of companies have been eſtabliſhed in *London* and other parts of the kingdom for inſurances againſt fire. Of theſe ſome are called *Contribution Societies*, in which every perſon inſured becomes a member or proprietor, participating in profit and loſs. Such are the *Hand in Hand*, and the *Weſtminſter* fire-offices, for the inſurance of houſes and other buildings; and the *Union* fire-office, for inſurance of goods. The other companies inſure both houſes and goods, at their own riſk. Of theſe the principal are the *London* and *Royal Exchange* aſſurance corporations, the *Sun*, the *Phœnix*, and the *Britiſh* fire-offices.

Policies againſt fire are ſubject to a *ſtamp* of 3 s. if under 1000 l. and of 6 s. if 1000 l. or upwards.—

As to the *duties*, to which this contract is liable, the ſtat. 37 *G.* III. c. 90, § 28, repeals all the former *ſtamp duties* impoſed on policies of inſurance againſt fire; and, (by ſect. 24,) impoſes on every policy, in lieu thereof, a new duty of *three ſhillings* where the ſum inſured is under 1000 l. and of *ſix ſhillings* where the ſum inſured amounts to 1000 l. or upwards.

Alſo to a *yearly* duty of 2 s. *per cent.* on the ſum inſured.

And, by the ſame act (ſect. 19,) the *yearly* ſum of *ſixpence*, over and above the yearly ſum of *one ſhilling and ſixpence*, already impoſed for every 100 l. and ſo in proportion for any leſs ſum inſured, is laid on every policy for inſuring houſes, furniture, goods, wares, and merchandize, or other property, from loſs by fire.

CHAP.

CHAP. II.

Of the Intereſt of the Inſured.

Whether an inſurance againſt fire without intereſt be void at common law.

I DO not find that it has ever been a practice to make inſurances againſt fire, avowedly without intereſt. The effect of ſuch inſurance would, I think, afford a powerful argument againſt the legality of any inſurance without intereſt, at common law. If a wager inſurance be good, at common law, I do not know that it muſt neceſſarily aſſume the form of any particular ſpecies of inſurance: But if the queſtion, whether a wager policy be a legal contract at common law, were to ariſe in the caſe of an inſurance againſt fire, it is impoſſible to ſuppoſe that the judges could ever be prevailed upon to ſanction, by their authority, a contract of ſo miſchievous a tendency.—Lord Chancellor *King*, in the caſe of *Lynch* v. *Dalzell*, which we ſhall preſently have occaſion to cite at large, ſays;—"The party inſuring muſt have a property at the time of the loſs, or he can ſuſtain no loſs, and conſequently can be entitled to no ſatisfaction." And Lord *Hardwicke*, in the caſe of the *Sadler's Company* v. *Badcock*, (*a*) lays it down as law, that the inſured muſt have an intereſt or property at the time of inſuring, and at the time the loſs happens. So that, according to theſe two great authorities, it is clear that an inſurance againſt fire, without intereſt, would have been void at common law. But if any doubt remained upon that queſtion, it has been removed by the ſtat. 14 *G.* III. c. 48. That act, though it is entitled, an act for regulating *inſurances upon lives*, yet, by the enacting clauſe, (ſect. 1,) (*b*) it prohibits

Since the ſtat. 14 *G.* III c. 48, it would be clearly void.

(*a*) Inf. 700.—(*b*) Sup. 672.

prohibits all inſurances without intereſt, "*upon any event or events whatſoever;*" (*a*) and therefore there can be no doubt but that it extends to inſurance againſt fire; and that the inſured, whatever may be the amount of his inſurance, can only recover to the extent of his intereſt.

The inſured can only recover, in caſe of loſs, to the extent of his intereſt.

There is no doubt but that inſurances againſt fire are often made to a large amount upon property of very ſmall value. This can only be done with a fraudulent view, and a premeditated fire muſt be the neceſſary conſequence. Where a loſs has happened, and there is no colour to ſuſpect any unfair practice on the part of the inſured, I think the offices ought not to content themſelves with being merely juſt: They ought to be generous and liberal towards a fair ſufferer. But where there is any reaſonable ground to ſuſpect fraud, it is to be hoped that the managers of no office will, from any falſe notion of generoſity, or any wiſh to acquire popular favour, ſo far forget what they owe to the public, as well as to their own characters, as to ſuffer the claim to be ſatisfied, without the moſt ſcrupulous inveſtigation.

The neceſſity of preventing inſurances againſt fire, without intereſt.

It often happens that no one office will inſure to the full amount required by a particular perſon, who has a large property to inſure; and in ſuch caſe, the party can only cover his whole intereſt, by ſeveral inſurances made at different offices. But then it is proper that each office ſhould have notice of every inſurance thus made on the ſame effects; for otherwiſe great frauds might be practiſed by inſuring the ſame property to its full value, at ſeveral different offices at the ſame time. To guard againſt ſuch frauds, there is, in the printed propoſals of each of the offices, an article which declares that, perſons inſuring muſt give notice of any other inſurance made elſewhere upon the ſame houſes or goods, that the ſame

If there be ſeveral inſurances on the ſame property, each office muſt have notice of this.

(*a*) The 4th ſection provides that it ſhall not extend to marine inſurances, which ſhews that it was the intention of the legiſlature that it ſhould extend, according to the above words in the enacting clauſe, to every other ſpecies of inſurance.

same may be allowed by indorsement on the policy; in order that each office may bear its rateable proportion of any loss that may happen. (*a*) But unless such notice be given of each insurance to the office where another insurance is made on the same effects, the insurance made, without such notice, will be void.

But a person may insure without having the absolute property.

It is not necessary, however, in order to constitute an insurable interest, that the insured shall, in every instance, have the absolute and unqualified property of the effects insured. A trustee, a mortgagee, a reversioner, a factor or agent, with the custody of goods to be sold upon commission, may insure; but with this caution, that the nature of the property be distinctly specified; (*b*) and that all the insurances upon the same property, *taken together*, shall not exceed the full value thereof.

(*a*) Vid. sup. 115.—(*b*) See the 6th article of the proposals of the *Sun* fire-office, and 7th article of the proposals of the *Phœnix* fire-office.

CHAP.

CHAP. III.

Of the Risk which Insurers engage to run.

BY the terms of the usual policy the insurers undertake to pay, make good, and satisfy to the insured all loss or damage, which may happen by fire, during the term specified in the policy, to the houses or other buildings, furniture, or merchandize insured.

The risk usually insured against.

By an article of the printed proposals, which, as we shall presently see, (*a*) are now to be considered as making a part of the contract, it is provided that, "No loss or "damage by fire, happening by any invasion, foreign "enemy, or any military or usurped power whatsoever, "will be made good by this company."

The proviso, excepting fires occasioned by extraordinary events.

In the following case, a question arose upon the construction of the words *usurped power* in this proviso.—It was an action of covenant on a policy of the *London Assurance* company against fire, upon a malting office at *Norwich*.—The defendants, amongst other pleas, pleaded that the malting office was burnt by *an usurped power*; and issue being joined on this plea, the cause was tried at *Norwich* assizes, and a verdict found for the plaintiff, damages 469*l.* subject to the opinion of the court upon a case, which stated, 'That on the 27th of *November*, a 'mob arose at *Norwich*, on account of the high price of 'provisions, and spoiled and destroyed a considerable 'quantity of flour: That thereupon the proclamation 'was read, and the mob dispersed for that time. That 'afterwards another mob arose and burnt down the malt-'ing office mentioned in the policy.'—This case was twice argued

The words *usurped power*, in the proviso, mean an invasion from abroad or an internal rebellion; not the power of a common mob.

Drinkwater v. *Lond. Assur.* 2 *Wilf.* 362.

(*a*) Vid. *Oldman* v. *Bewicke*, *Routledge* v. *Burrell*, and *Wood* v. *Worsley*, inf. ch. 5.

argued at the bar, and the court took time to deliberate. At length Lord C. J. *Wilmot*, Mr. Juſtice *Clive*, and Mr. Juſtice *Batburſt*, againſt the opinion of Mr. Juſtice *Gould*, determined that the true import of the words *uſurped power* in the proviſo, was, an invaſion from abroad, or an internal rebellion, where armies are drawn up againſt each other; when the laws are ſilent; and when the firing of towns becomes unavoidable: But that thoſe words could not mean the power of a common mob.

The words *civil commotion*, were held to exclude loſſes in the riots of 1780.

The *London Aſſurance* company ſtill, however, retain the proviſo in its original form. The *Sun Fire Office*, in the year 1727, added the words *civil commotion*; (*a*) and upon the conſtruction of theſe words another queſtion aroſe in conſequence of the tumults with which the metropolis of the *Britiſh* empire was diſgraced in the ſummer of the year 1780. Theſe tumults were excited by certain perſons who, under the maſk of religion, pretended to ſeek the repeal of a law then lately paſſed, granting to *Roman* catholics, certain indulgences and ſome mitigation of the hardſhips, under which they, at that time, laboured in this country; but their object was nothing leſs than the entire ſubverſion of the government. And to accompliſh this purpoſe, they excited to univerſal devaſtation, a deſperate and lawleſs rabble, made up of malefactors and fanatics, who, though actuated by different motives, are at all times equally prone to miſchief and rebellion. Fortunately for this country, the militia was at that time embodied, the rioters were repreſſed, and the conſtitution preſerved.

Amongſt

(*a*) Moſt of the other offices have introduced the ſame words; and ſome have the words '*riot, tumult, and civil commotion.*' It is rather remarkable, however, that neither the *Hand in Hand* or the *Union* fire offices has any proviſo or exception of this nature in their printed propoſals. It were, perhaps, to be wiſhed, that none of the offices would inſure againſt the miſchiefs occaſioned by riot and civil commotion. Men cannot be too deeply intereſted in the preſervation of the public peace, and the ſupport of lawful authority.

Amongſt others devoted to deſtruction by this deſperate banditti, was Mr. *Langdale*, a catholic, and a conſiderable diſtiller. His premiſes they fired; and all his ſtock of liquors and other effects were there deſtroyed.—Being inſured at the *Sun Fire Office*, he brought his action upon the policy, to recover a ſatisfaction for the loſs he had thus ſuſtained. The office defended this action on the ground that this loſs was occaſioned by *civil commotion*.—The cauſe was tried by Lord *Mansfield*, and, upon the facts of the plaintiff's caſe being proved, the point was argued very much at large by the counſel on both ſides.—Lord *Mansfield*, in his addreſs to the jury ſaid,—"Moſt undoubtedly every man's leaning muſt be to the ſide of the plaintiff, in order to divide the loſs in ſo great a calamity. But that inclination muſt be governed by the rules of law and juſtice; and the only queſtion to be determined ariſes ſingly upon the conſtruction of two words in the policy. It appears that in the year 1720, the *London Aſſurance* company put into their policies all the words here uſed, except *civil commotion*; and any fire happening by a foreign enemy is clearly provided againſt, whether they burn houſes, or ſet fire to a town. The words *military or uſurped power* are ambiguous: but they have already been the ſubject of a judicial determination. (*a*) They muſt mean rebellion, conducted by authority; as in the year 1745, when the rebels came to *Derby*; and if they had ordered any part of the town, or a ſingle houſe, to be ſet on fire, that would have been by authority of a *rebellion*. That is the only diſtinction in the caſe: It muſt be by rebellion got to ſuch a head, as to be under ſome authority. In the year 1726, the *Sun Fire Office*, in imitation of the *London Aſſurance* company, inſerted the ſame exception: This provided againſt rebellion, determined rebellion, with generals who could give orders: But the *Sun Fire Office* did not think this ſufficient; and therefore, in the year 1727, they introduced the words *civil commotion*; words

Langdale v. *Maſon* and others, at N. P. Mich. Vac. 1780. MS.

(*a*) Vid. *Drinkwater* v. *Lond. Aſſur.* ſup. 687.

words as general and untechnical as can possibly be used. They do not say *civil commotion*, such as amounts to *high treason*. They avoid saying civil commotion amounting to *felony* or to a *misdemeanour*, but they use the term "civil commotion," taking the largest and most general sense of the words that the language will allow; They do not even say a *riot*. It may be a question, in point of law, whether an assembly or multitude be a riot. But the single question here is, whether this has been a civil commotion. If there be a case, to which these words can be applicable, it is to a case of this sort. I cannot see any of the other words, to which it can be applied. Usurped power takes in rebellion, acting under usurped authority. From a foreign enemy the office *is secured*: But what is a civil commotion? It is something else. The present was an insurrection of the people resisting all law, setting the authority of the government at nought; and depriving of its protection whoever was obnoxious to them. What was the object and end of this violent insurrection? It took place in many parts of the town at the same time, and the very same night; the mob were in *Broad Street*, *St. Catherine's*, in *Coleman-street*, at *Blackfriar's Bridge*, and at the plaintiff's. What is their object? *General destruction, general confusion. It certainly was meant to aim at the very vitals of the constitution.* It was not a private matter, under a cry of *No popery* only, to destroy all papists. *Newgate* is burnt down: The *Fleet* prison, the *King's Bench* prison, the new *Bridewell*, are burnt down, and all the prisoners set at liberty. The *Bank* attacked; the *Excise* and *Pay* offices in *Broad-street* threatened. The houses of a vast number of papists burnt and destroyed. Military resistance necessary, and an extraordinary stretch was made, which was justified by necessity. Many men have been killed. What is this but a *civil commotion*, if any precise meaning can be affixed to those words. It is said that this is a civil commotion distinct from usurped power and rebellion. It is admitted, that this kind of insurrection may amount to high treason: and, to be sure, it may. But the office do not mean to

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try whether theſe rioters were guilty of high treaſon or not. It is not put upon that, but on the ground of a civil commotion. It is not an occaſional riot: That would be another queſtion. I do not give any opinion what that might be. You will give your opinions, whether the facts of this caſe bring it within the idea of a civil commotion. I think a civil commotion is this; *an inſurrection of the people for general purpoſes*, though it may not amount to a rebellion, where there is an uſurped power. If you think it was ſuch an inſurrection of the people for the purpoſes of general miſchief, though not amounting to a rebellion, but within the exception of the policy, you will find for the defendants. If not, you will find for the plaintiffs. The jury found a verdict for the defendants.

But Mr. *Langdale* was not without remedy. He afterwards brought his action againſt the *Hundred*, upon the riot act, 1 *G.* I. c. 5, § 6, and recovered a full ſatisfaction for the damage he had ſuſtained.—Had the office not been exempted from this loſs by the words *civil commotion* in their propoſals, they would have had their remedy over againſt the *Hundred*. In the following caſe, which came before the court of King's Bench in the year 1782, it was determined that an inſurance company, having paid a loſs occaſioned by riots, may recover back ſuch loſs, in an action againſt the *Hundred*, on the above act, brought in the name of the inſured.

But an inſurance company who pay a loſs, occaſioned by riots, have their remedy over againſt the *Hundred*, by action upon the riot act, in the name of the inſured.

That was an action brought againſt the *Hundred* on the riot act, ſtat. 1 *G.* I. c. 5, § 6, to recover a ſatisfaction for the damage ſuſtained by the plaintiff, by the demolition of his houſe, in the riots of 1780.—Upon the trial of the cauſe, there was a verdict for the plaintiff, with 259 l. damages, ſubject to the opinion of the court on a caſe, which ſtated, in ſubſtance, that the plaintiff had inſured his houſe in the *Hand in Hand* fire-office; that the fire office had paid the loſs, without any action being brought againſt them; and that this action was brought againſt the *Hundred* in the plaintiff's name, and with his conſent, for the benefit of the inſurance office, and to reimburſe them the loſs they had paid.—The queſtion was whether,

Maſon v. *Sainſbury*, E. 22 *G.* III. B R.—MS.

whether, as the plaintiff had already received a ſatisfaction, this action could now be maintained againſt the Hundred on behalf of the inſurers.—It was contended, on the part of the Hundred, that it was the policy of the act, beſide the inducement to ſuppreſs riots, to divide the loſs, and prevent the ruin of individuals; but there could be no reaſon of policy or juſtice to extend this, beyond the party himſelf, to bodies or individuals, who have wilfully put themſelves into this danger: That though it was true that a man, having different remedies may purſue either, and it is no defence to the one, that he might have purſued the other; yet, when he has recovered by one, he ſhall not afterwards ſeek a ſecond ſatisfaction by the other.—But the court were *unanimouſly of* opinion that the office had a right in this *caſe, to* recover againſt the Hundred, in the name of the inſured.—Lord *Mansfield* ſaid,—"Though the office paid without a ſuit, this muſt be conſidered as without prejudice; and it is, to all intents, as if it had never been paid. The queſtion comes to this: Can the owner of the houſe, having inſured it, come againſt the Hundred, under this act? Who is firſt liable? If the Hundred be firſt liable, ſtill it makes no difference: If the inſurers be *firſt liable*, then payment by them is a ſatisfaction, and the Hundred is not liable. But the contrary is evident, from the nature of the contract of inſurance. It is an *indemnity*. We every day ſee the inſured put in the place of the inſurer. In abandonment it is ſo; and the inſurer uſes the name of the inſured. It is an extremely clear caſe. The act puts the Hundred in the place of the treſpaſſers; and on principles of policy, I am ſatisfied that it is to be conſidered as if the inſurers had not paid a farthing."—Mr. Juſtice *Willes* ſaid,—"I cannot diſtinguiſh this from the caſe of an eſcape. If the ſheriff pays, he has his remedy over againſt the party. Though the Hundred is not anſwerable criminally, yet they are not to be conſidered as wholly free from blame. They may have been negligent, which is partly the principle of the act." Mr. Juſtice *Aſhurſt* ſaid,—"At all events the plaintiff is entitled to a verdict to the amount of the premium, having

having had no compenſation as to that. But, on the larger ground, I am of opinion that the Hundred is liable in this action for all the damage ſuſtained by the plaintiff. It is like the caſe of an abandonment, and the office is not to be in a worſe ſituation for having paid the loſs without a ſuit."—Mr. Juſtice *Buller* ſaid,—"Whether this caſe be conſidered on ſtrict, or on liberal, principles of inſurance law, the plaintiff muſt recover. Strictly, no notice can be taken of any thing out of the record. The contract with the office, ſtrictly taken, is a wager; liberally, it is an indemnity: But, on the words, it is only a wager, of which third perſons ſhall not avail themſelves. It has been rightly admitted that the Hundred is put in the place of the treſpaſſers. How could the treſpaſſers have availed themſelves of this ſatisfaction made by the office? Could they have pleaded it by way of *accord and ſatisfaction?* It was not paid as a ſatisfaction for the treſpaſs, and the facts of the caſe would not have ſupported ſuch a plea. The beſt way is to conſider this caſe as a contract of indemnity, in which the principle is, that the inſurer and the inſured are as one perſon; and in that light, the paying before or after, can make no difference."

How far the inſured is protected by the policy during the 15 days allowed for paying the renewed premium.

In general the riſk commences from the ſigning of the policy, unleſs ſome other time be ſpecified; and it will of courſe end with the term for which it is made. Inſurances againſt fire are, in general, either annual, or for a term of ſeven years, at an annual premium; and the offices, as an indulgence to the inſured, generally allow 15 days from the expiration of each year for the payment of the premium for the next ſucceeding year. But the inſured has always been conſidered as being under the protection of the policy till the expiration of the 15 days, provided the premium were paid within that time.

How far in the caſe of a half-yearly policy.

In the printed propoſals of the *Sun Fire Office*, and of ſome others, there is this article:—'On beſpeaking 'policies, all perſons are to make a depoſit for the pol'icy, ſtamp duty, and mark; and ſhall pay the pre-

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'mium to the next quarter-day, and from thence for one 'year more at leaſt; and ſhall, as long as the managers 'agree to accept the ſame, make all future payments 'annually at the ſaid office, within 15 days after the 'day limited by their reſpective policies, upon forfeiture 'of the benefit thereof; and no inſurance is to take place 'till the premium be actually paid by the inſured, his, her, 'or their agent or agents.'—In the following caſe it became a queſtion how far the inſured, upon a half-yearly policy, was protected during the 15 days, before the new premium was actually paid and accepted.

The inſured in a policy agrees to pay the premium half-yearly, within 15 days of the expiration of the former half-year. A loſs happens within the 15 days, but before the renewed premium is paid.—The inſurers are not liable, though the premium was tendered before the end of the 15 days.

It was an action againſt the *Liverpool* fire-office, which had adopted the above article. The plaintiff declared on a policy dated the 10th of *December* 1788, *in which,* (after reciting that the plaintiffs had paid 7 l. 10 s. to the office, and had agreed to pay 7 l. 10 s. on the 10th of *June* 1789, and the like ſum every ſix months during the continuance of the policy,) it was declared that, from the date of the policy, ſo long as the plaintiffs ſhould pay the ſum of 7 l. 10 s. at the times and places aforeſaid, and the truſtees or acting members of the ſociety ſhould agree to accept the ſame, the *funds of* the ſociety ſhould be liable to pay the plaintiffs ſuch damage and loſs as they ſhould ſuffer by fire, not exceeding 6000 l. according to the exact tenor of their printed propoſals.—The declaration, after ſetting forth the above article of the printed propoſals, ſtated that the ſociety had, from the year 1777, been in the practice of inſuring for periods leſs than a year, by policies ſimilar to the preſent, referring, in like manner, to the ſame printed propoſals; and that they had received the premiums within the 15 days after the times limited in ſuch policies, and the policies thereupon remained in force. It then ſtated a loſs, to the amount of 6000 l. on the 11th of *December* 1789, before the expiration of the 15 days, and before any refuſal to accept the renewed premium, or to continue the policy. There was a ſecond count, ſtating that, before the expiration of the 15 days, the plaintiffs tendered at the office 7 l. 10s. to the managers of the ſociety

Tarleton and others v. *Staniforth* and others. 5 T. R. 695.

ſociety, they not having then diſagreed or refuſed to accept the ſame.—The defendants, amongſt other pleas to the firſt count, pleaded that the plaintiffs did not pay the ſum of 7 l. 10 s. on or before the 10th of *December*, as they ought to have done, in order to have continued the policy to the time when the loſs happened. To the ſecond count they pleaded, that the ſum of 7 l. 10 s. was not tendered to the managers, until after the 10th of *December*.—Upon a demurrer to theſe pleas, the court determined that, under the above circumſtances, the plaintiffs were not entitled to recover, and gave judgment for the defendants.—Lord *Kenyon* ſaid;—"It is admitted that the inſurance did not extend to half a year and 15 days; and that completely puts an end to the whole caſe. The plaintiffs ſtipulated to pay 7 l. 10 s. half yearly, on the 10th of *June*, and the 10th of *December*; and that they would, *as long as the managers agreed to accept the ſame*, make their payments within 15 days after the day limited; *but no inſurance is to take place until the premium be actually paid.* The continuation of the term, therefore, depends on two circumſtances which muſt both concur; namely, that the inſured ſhould pay the 7 l. 10 s. and that the inſurers ſhould agree to accept that ſum. Barely ſtating theſe facts is ſufficient to ſhew that the plaintiffs are not entitled to recover."

Soon after the above deciſion, the *Royal Exchange*, the *Phœnix*, and ſome other inſurance companies gave notice that they did not mean to take advantage of this judgment; but would hold themſelves liable for any loſs during the 15 days that are allowed for the payment of the renewed premium upon annual policies, and others for a longer period: But that every policy for a ſhorter period than a year, would ceaſe at ſix o'clock in the evening of the day mentioned therein.

But ſeveral offices hold themſelves liable during the 15 days *on annual policies.*

CHAP.

CHAP. IV.

Of the Assignment of the Policy.

An assignment of the policy to one who has no interest in the effects insured, is void.

A POLICY of insurance, being a *chose in action*, is, in strictness, not assignable at law. But, like every other chose in action, it may be assigned in equity; and courts of law now take notice of such assignment; so that the ancient rule of the common law, being often found injurious to the interests of a commercial country, is now, in a manner, disregarded, or at least evaded. But the mere assignment of the policy, would be of little avail, without an assignment of the subject matter of the insurance also. The assignee could derive no benefit from the policy, unless the interest of the insured were transferred with it; because, as we have already shewn, the insured must not only have an interest in the subject matter of the insurance, at the time of insuring, but also at the time the loss happens. (*a*)

Upon the death of the insured, the policy is continued to his representative.

In the printed proposals of all the offices it is declared that, upon the death of an insured, his interest in the policy shall be continued to his representative to whom the property insured belongs, provided such representative, before any new payment be made, procure his right to be indorsed on the policy at the office.

The contribution societies seem to allow the assignment of their policies without any express permission.

In the proposals of the *Hand in Hand* fire-office, it is declared, that if the premises insured should be assigned, the assignment must be entered at the office; and that assignments of policies shall be entered at the office, within 42 days after they are executed; or else the assignee shall have no benefit thereby. And in the proposals

(*a*) Per Lord *King*, Ch. in *Lynch* v. *Dalzell*, inf. 698; Per Lord *Hardwicke* Ch. in the *Sadler's Company* v. *Badcock*, inf. 700; vid. sup. 684.

poſals of the *Union* fire-office, it is declared, that every member transferring his policy, ſhall, within three months, give notice to the directors, and bring their policies to the office, to have ſuch transfer indorſed.

The *Weſtminſter* office merely deſires that the aſſignment ſhall be entered at the office as ſoon as poſſible. So that, it would ſeem, the policies of theſe three *contribution ſocieties* may be aſſigned, without any expreſs permiſſion from the reſpective offices for that purpoſe; and that it is ſufficient if the aſſignment be brought to the reſpective offices to be entered.

But the other offices allow of no aſſignment, without their expreſs permiſſion.

But the other offices give notice, generally upon the policy, that it ſhall be of no force if aſſigned, unleſs ſuch aſſignment be allowed by an entry in the books of the office, or indorſed on the policy. So that it ſeems to be a ſettled rule in all the offices, not to allow any transfer of any policy, without the conſent of the managers. This is perfectly reaſonable. The offices may chooſe for whom they will inſure; they are not obliged to inſure for every perſon that may apply to them. In ſome inſtances, character may be a ſufficient reaſon for a refuſal. But the offices would be deprived of this option, if any perſon inſured might aſſign his policy to whom he pleaſed, without their concurrence. This will appear from the following caſe.

The inſured upon a houſe and goods aſſigns the houſe to *A.* and the goods to *B.*; & aſſigns the goods over to *A.* to ſecure to *A.* the money advanced for *B.* to purchaſe them. Afterwards a fire happens, and the inſured aſſigns the policy to *A.* and *B.* alſo aſſigns to him his intereſt in the policy. Theſe aſſignments of the policy being

On the 28th of *July* 1721, one *Richard Ireland* obtained a policy from the *Sun* fire-office for the inſurance of his houſe, being the *Angel* inn at *Graveſend*, with his goods therein, from loſs and damage by fire: And it was agreed, that ſo long as *Ireland* ſhould pay five ſhillings a quarter, the ſociety would ſatisfy the ſaid *Ireland*, his executors, adminiſtrators, and aſſigns, his loſs not exceeding 1000 l. according to the exact tenor of their printed propoſals.—Some conſiderable time afterwards, *Ireland* died, leaving his ſon *Anthony* his ſole executor: Who brought the policy to the office, and had an indorſement made thereon, that the ſame belonged to him; and he afterwards paid one year's premium up to *Chriſtmas* 1727. In *Auguſt* 1727, the houſe was deſtroyed by fire; and ſome time afterwards, the plaintiffs

made after the fire happened, and without the conſent of the office, the aſſignee cannot recover the loſs under it.

Lyn.b and another v *Dalzell* and others, 3 *Bro.* Parl. Ca. 497.

tiffs applied to the office, and alledged that they had purchaſed the houſe and goods of *Anthony Ireland*; that the ſame were their property at the time of the fire; and that they had an aſſignment of the policy made to them, at the ſame time that the houſe and goods were aſſigned; and they produced an affidavit from *Roger Lynch*, in which he ſwore that their loſs, by the burning of the houſe, amounted to 500 l. and upwards; and upon this affidavit was indorſed the uſual certificate from the miniſter and churchwardens, &c. But neither in the affidavit or certificate, was any mention made of any loſs being ſuſtained by the plaintiffs by the burning of any goods; nor was any affidavit made by *Anthony Ireland*, that he had ſuffered any loſs.—The plaintiffs, however, inſiſted that the office ſhould pay them 1000 l. for their loſs by the burning of the houſe and goods; and they filed a bill in chancery, ſetting forth, that *Anthony Ireland*, on the 24th of *June* 1727, for 250 l. aſſigned to them a leaſe of the houſe and ſtables; but, that the goods, for which the plaintiffs, as they alleged, were to pay 500 l. being intended for one *Thomas Church*, who was to hold the inn under them, *Ireland*, by bill of ſale of the ſame date, ſold the ſame to *Church* for his own uſe. The bill alſo ſtated the aſſignment of the policy to the plaintiffs; and that, although the bill of ſale of the goods was made to *Church*; yet that the plaintiffs paid the purchaſe money, and *Church* aſſigned the bill of ſale to them for ſecuring it; and alſo releaſed to the plaintiffs his intereſt in the policy.—The defendants, by their anſwer, alleged that the affidavit produced was not agreeable to the propoſals; that no aſſignment of the policy was made to the plaintiffs, nor any aſſignment of it made to them by *Church*, till after the fire. They inſiſted that the policies iſſued by the office were not, in their nature, aſſignable, being only contracts to make good the loſs which the contracting party *himſelf* ſhould ſuſtain; and that no other perſon was entitled to any benefit from it. The cauſe proceeded to iſſue; and witneſſes being examined on both ſides, it appeared upon the plaintiff's own evidence, that the agreement for the aſſignment of

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the policy, (if any,) was not till after the agreement for the purchaſe of *Ireland*'s term in the houſe; and that the aſſignment of it, though bearing date *before*, was not made till ſome time *after* the fire: So that the agreement for aſſigning the policy was a voluntary conceſſion on the part of *Ireland*, and independent of the bargain for the houſe, and not made till after *Ireland*'s intereſt in the houſe was determined; nor carried into execution till after the loſs had happened. And as to the plaintiff's property in the goods, they proved an aſſignment from *Church* to them, as a ſecurity for 300 l.; but omitted to ſtate *when* this aſſignment was made, though the defendants, by their anſwer, had put the time in iſſue.—Upon this caſe, the Lord Chancellor *King* diſmiſſed the plaintiff's bill.—He ſaid,—"Theſe policies are not inſurances of the ſpecific things mentioned to be inſured; nor do ſuch inſurances attach on the realty, or in any manner go with the ſame, as incident thereto, by any conveyance or aſſignment: But they are only ſpecial agreements with the perſons inſured, againſt ſuch loſs or damage as they may ſuſtain. *The party inſured muſt have a property at the time of the loſs, or he can ſuſtain no loſs: And conſequently can be entitled to no ſatisfaction.* There was no contract ever made between the office and the plaintiffs for any inſurance on the premiſes in queſtion. Not only the expreſs words, but the end and deſign of the contract with *Ireland*, do, in caſe of any loſs, limit and reſtrain the ſatisfaction to ſuch loſs as ſhould be ſuſtained by *Richard Ireland* only; and the indorſement on the policy transferred that right to his executor *Anthony Ireland* only. Theſe policies are not in their nature aſſignable; nor is the intereſt in them ever intended to be transferable from one to another, without the expreſs conſent of the office. The tranſactions in the preſent caſe, by changing the property backwards and forwards, and rendering it uncertain whoſe the true property really was, raiſe a ſuſpicion, and fully juſtify the caution of the office in preventing the aſſignment, without the conſent of the managers; which method is purſued by all the inſurance offices. Beſides, the plaintiff's claim

The policy does not paſs with the effects inſured.

The policy is only aſſignable with the conſent of the office.

claim is, at best, founded only on an assignment never agreed for, till the person insured had determined his interest in the policy, by parting with his whole property, and never executed till the loss had actually happened." —Upon appeal to the House of Lords, the decree of the Court of Chancery was affirmed.

A lessee having an unexpired term of six years and an half in a house, insures for seven years. After the term expired the house is burnt, and afterwards, but before the expiration of the policy, the insured assigns it to the reversioner, without the concurrence of the office.—The assignee cannot claim any benefit under the policy.

The *Sadler's Company* v. *Badcock* and others, 2 *Atk.* 554.

The same principles were adopted in another case, where one *Anne Strode*, having six years and a half to come in a lease of a house from the plaintiffs, on the 27th of *April* 1734, insured the house for 400 l. in the *Hand in Hand* fire-office, for seven years, and thereby became a proprietor; and, on paying twelve shillings down, and 3 l. some time after, the company agreed, out of their contribution stock, '*to pay the said sum of* 400 *l.* '*to her, her executors and assignees, so often as the house* '*should be burnt down during the said term, unless the di-* '*rectors should rebuild the same;*' and on the back of the policy it was indorsed, '*that if the policy should be assigned,* '*the assignment must be entered within* 21 *days after the* '*making thereof.*'—Mrs. *Strode*'s lease expired at *Midsummer* 1740; the house was burnt down in *January* 1741; and she assigned the policy to the plaintiffs on the 23d of *February* 1741. The plaintiffs tendered the assignment to the defendants to be entered in their books, but they refused to accept it. The company, in 1738, which was subsequent to Mrs. *Strode*'s policy, made an order, 'That 'whereas policies expire upon the property of the in-'sured's ceasing; if there is no application of the in-'sured to assign, or to have the loss made up, then 'the person having the property, may insure the said 'house in the said office, notwithstanding the term 'for which the said house was originally insured is 'not expired.' The question upon this cause was, whether the plaintiffs, the assignees of Mrs. *Strode*, were entitled to the benefit of the policy.—The court determined that they were not entitled to any benefit under it.—The Lord Chancellor *Hardwicke* said;—"During the progress of this cause, while the defendants seemed to depend chiefly upon the subsequent order,

I was

I was of opinion againſt them. But, upon hearing what was further offered, I think the plaintiffs are not entitled to be relieved. There may be three queſtions made in this cauſe. *Firſt*, whether this accident, which has happened, be ſuch a loſs, as obliges the defendants to make ſatisfaction to the plaintiffs. *Secondly*, whether upon the terms of the original policy, the office be obliged to do it. *Thirdly*, which is rather conſequential of the former, whether the plaintiffs are properly aſſignees of Mrs. *Strode*, under this policy. If this matter reſted ſingly upon the policy itſelf, I ſhould not think it ſuch a loſs, as would oblige the defendants to make ſatisfaction. Under this policy, the ſtate of the caſe is, Mrs. *Strode* was only a leſſee; her time expired at *Midſummer* 1740; the houſe was burnt down in *January* after, *within the ſeven years*; the plaintiffs, the *Sadler's Company*, were ground landlords, and entitled to the reverſion of the term: Upon the 23d of *February*, ſeven months after the expiration of the term, and one month after the fire, the aſſignment was made, and in conſideration of five ſhillings only; ſo that it muſt be taken as a voluntary aſſignment, as it ſtands before me. It has been inſiſted, on the part of the defendants, that the plaintiffs are not entitled to recover, as ſtanding in the place of Mrs. *Strode*, becauſe ſhe had no loſs or damage, her intereſt ceaſing before the fire happened. And this introduces the ſecond and third queſtions. I am of opinion, that it is neceſſary the party inſured ſhould have an intereſt or property at the time of inſuring, and at the time the fire happens. It has been ſaid for the plaintiffs, that it is in nature of a wager laid by the inſurance company, and that it does not ſignify to whom they pay, if loſt. Now theſe inſurances from fire have been introduced in later times, and therefore differ from inſurance of ſhips, becauſe there, *intereſt or no intereſt* is almoſt conſtantly inſerted; and if not inſerted, you cannot recover, unleſs you prove a property. By the firſt clauſe in the deed of contribution in 1696, the year this ſociety, called the *Hand in Hand Office*, incorporated themſelves, the ſociety

are

are to make ſatisfaction in caſe of any loſs by fire. To whom, or for what loſs, are they to make ſatisfaction? Why to the perſon inſured, and for the loſs he may have ſuſtained; for it cannot properly be called inſuring *the thing*, for there is no poſſibility of doing it, and therefore, muſt mean inſuring *the perſon* from damage. By the terms of the policy, the defendants might begin to build and repair within ſix days after the fire happens. It has been truly ſaid, this gives the ſociety an option to pay or rebuild, and ſhews moſt manifeſtly that they meant to inſure upon the property of the inſured, becauſe nobody elſe can give them leave to lay even a brick; for another perſon might fancy a houſe of a different kind. Thus it ſtands upon the original agreement. The next queſtion will be, whether the ſubſequent order made by the defendants in 1738, has made any alteration. I am opinion that it has not; for it was made only to explain a particular caſe in the policy, for it might have been a queſtion, whether Mrs. *Strode* could have come before the expiration of the term, to examine the books of the office, and therefore this order was made to give her ſuch a power. It has been ſtrongly objected that the ſociety could not make ſuch an order. I am very tender of ſaying, whether they can or not. Becauſe, on the one hand, it might be hard to ſay, that, as a ſociety, they cannot make any order for the good of the ſociety: On the other hand, it would be a dangerous thing to give them a power to make an alteration, that may materially vary the intereſt of the inſured. The aſſignment is not at all within the terms of this order, becauſe it is plain, it meant an aſſignment before the loſs happened. Now with regard to the loſs happening before the aſſignment made, Mrs. *Strode* was entitled to nothing but what was to be paid back upon the depoſit. It is plain ſhe thought ſo, for if ſhe had imagined ſhe had been entitled to 400 l. would any friend have adviſed her to make a preſent of it to the plaintiff? The caſe of *Lynch* v. *Dalzell*, in the Houſe of Lords, ſhews how ſtrict this court and that houſe are, on the conſtruction of policies, to avoid frauds."

The

The foregoing determinations shew that, upon an assignment or other transfer of the property insured, the assignee should be very careful to get the policy regularly transferred to him, by the proper indorsement at the office. And in a former part of this work, (*a*) it was shewn that if the assignor undertake to get this done, he will be liable to the assignee for all the consequences of neglecting or omitting to do so; even though his undertaking was merely gratuitous.

If an assignor of the property insured undertake to get the policy transferred to the assignee, he will be liable to an action for neglecting to do so.

(*a*) Vid. *Wilkinson* v. *Coverdale*, sup. 207.

CHAP.

CHAP. V.

Of the Proof of Loss.

Of the account of the loss, the affidavits of the insured, and the certificate from the minister, &c. required by the printed proposals.

THE form of the policy is nearly the same in all the offices. (*a*) The principal difference between them consists in the terms of certain *proposals*, as they are called, to which it refers, as making a part of the contract. One principal article, which is found in the proposals of several of the offices (*b*) imports,—'That persons insured sustaining any loss or damage by fire are forthwith to give notice thereof at the office, and, as soon as possible afterwards, deliver in as particular an account of their loss and damage, as the nature of the case will admit of; and make proof of the same by their oath or affirmation, according to the form practised in the said office; and by their books of accounts, or other proper vouchers, as shall be reasonably required; and procure a certificate under the hands of the minister and churchwardens, together with some other reputable inhabitants of the parish, not concerned in such loss, importing,—That they are well acquainted with the character and circumstances of the person or persons insured, and do know or verily believe, that he, she, or they, really and by misfortune, without any fraud or evil practice, have sustained by such fire, the loss and damage, as his, her, or their loss, to the value therein mentioned: But, till such affidavit and certificate of such insured's loss shall be made and produced, the loss money shall not be payable. And, if there appear any fraud or false swearing, such sufferers shall be excluded all benefit

(*a*) Vid. Append. No. VII.—(*b*) The *Royal Exchange*, the *Sun*, and the *Phœnix* fire-offices.

'eſit by their policies.' In the policies of theſe offices the inſurers undertake to pay the loſs, not exceeding the ſum inſured, '*according to the exact tenor of their printed* '*propoſals*,' deſcribing their propoſals by their reſpective dates.

The above article, though not worded in the beſt poſſible manner, has undoubtedly a very beneficial tendency. Nothing can be more reaſonable in a caſe where there is ſo great a temptation to fraud, than to require a teſtimonial from perſons in public ſituations in the pariſh where a fire has happened, who have opportunities of informing themſelves as to the characters of the inſured, and the fairneſs of their claims; and who are not likely to connive at any fraud. "It is a duty," ſays Mr. Juſtice *Lawrence*, (*a*) "that the office owes to the public as well as to themſelves, to take every precaution to protect themſelves againſt fraud. And unleſs ſome ſuch check as the preſent were interpoſed, the office would be holding out a premium to wicked men to ſet fire to their own houſes."—Perhaps it may, ſome time or other, be thought adviſable for all the inſurance companies to agree among themſelves to have this article reviſed, and put into a more unexceptionable form, and to adopt it univerſally. The conſtruction of this article has given occaſion to ſeveral judicial deciſions.

The reaſonableneſs of requiring this proof.

The firſt was an action againſt the directors of the *Sun Fire Office*, upon one of their policies. The plaintiffs, in their declaration, after ſtating that the bankrupt, the inſured, had conformed to the above article, as to the notice, account, and affidavit of the loſs; ſtated that the miniſter of the pariſh of *Portſea*, in which the loſs had happened, reſided at a diſtance from the pariſh, and was wholly unacquainted with the character and circumſtances of the inſured, and unable to make the certificate required by the policy; but that the inſured had procured and delivered to the office a certificate under the hands of ſeveral reputable inhabitants of the

To excuſe the want of the certificate, it is not enough to allege that the miniſter reſides out of the pariſh, and does not know the inſured. And the want of this certificate is a defect of title, for which the Court will arreſt the judgment, after the plaintiff has

(*a*) 6 T. R. 722.

obtained a verdict on the queſtion of fraud and want of intereſt.

Oldman and others, aſſignees of *Ingram*, v. *Bewicke* and others, in C. B. Mich. 26 G. III. 2 H. *Bl.* 577, n.

the tenor required by the article. The defendants pleaded 1ſt. That the premiſes were wilfully ſet on fire, and burnt down by the inſured. 2dly. That at the time of the ſuppoſed loſs the inſured had no intereſt in the premiſes. No notice was taken in any of the pleas, of the want of the certificate.—Iſſues being joined on the above pleas, the cauſe went to trial, and the jury found a verdict for the plaintiffs, damages 300 l.—The demand was 1500 l. the ſum inſured.—The defendant moved in arreſt of judgment, on the ground that the plaintiffs had not ſet forth in their declaration a ſufficient title to recover upon the policy againſt the defendants.—In anſwer to this application, it was ſaid that it was grounded either on the title being defective, or defectively ſet forth: That the latter objection was cured by the verdict, and the former varied by the defence ſet up by the pleas.—The court, however, arreſted the judgment.—Lord *Loughborough* ſaid,—"Though I am ſatisfied the verdict was right, that the fire was accidental, and that the certificate could not have been procured, becauſe the inſured had not ſuſtained all the loſs he claimed; yet the rule of intendment after verdict cannot be applied where there is an abſolute defect of title, as there is in this caſe. As to the pleas, they are wholly collateral to the title."—Mr. Juſtice *Gould* ſaid,—"Till the affidavit is made, and the certificate procured, the money is not payable: The time of payment, therefore, is not yet come. Though a perſon were a *bonâ fide* ſufferer, ſtill he is not entitled without a certificate. The ſtipulation is a condition precedent, that there ſhall be a certificate to ſhew that there is no kind of fraud. Nothing is ſaid about the churchwardens; and the excuſe of the miniſter living at a diſtance is frivolous."

The article of the printed propoſals requiring the certificate, though without ſtamp, ſeal, or ſignature, though only referred to in

The next caſe upon this ſubject was an action of covenant brought by the executrix of the inſured on a policy of the *Sun Fire Office*.—The declaration, by way of excuſe for not producing the certificate required by the above article, ſtated that the teſtator, the inſured, after the loſs, being entitled to ſuch certificate, applied to the

miniſter and church-wardens, and to many reputable inhabitants to procure ſuch certificate; but that the defendants, by falſe inſinuations, and promiſes of indemnity, prevailed on the miniſter, &c. to refuſe to ſign it. ---The defendants, as to the firſt breach of covenant, pleaded, 1ſt. That the inſured had no intereſt in the goods, &c. inſured; and 2dly. That they did not prevail on the miniſter, &c. to refuſe to ſign the certificate. ---And as the ſecond breach, they pleaded, 1ſt. No intereſt; and 2dly. That neither the teſtator in his life time, nor the plaintiff ſince his death, had procured ſuch certificate.---Iſſue was joined upon the three firſt pleas, and the plaintiff demurred to the laſt.---In arguing that demurrer, it was contended on the part of the plaintiff, 1ſt. That a condition or reſtriction could not be annexed to, and made part of a deed, by words of mere reference to a printed paper, diſtinguiſhed only by the date of the year in which it was printed, without any ſignature, ſeal, or ſtamp, to give it authenticity; and 2dly. That the reſtriction in queſtion, though it were properly annexed to the deed, was bad in itſelf. Many authorities were cited in ſupport of theſe propoſitions:--- But the court ſaid that the matter was too clear to admit of a doubt, and gave judgment for the defendants.

the policy, is part of the contract, and is binding on the inſured.

Routledge Executrix v. *Burrell*, Bart. and another, 1 H. *Bl.* 254.

At length, in the following caſe, it has been fully ſettled, after ſolemn argument, and upon full deliberation, that the printed propoſals are to be taken as part of the policy; that the procuring of the certificate from the miniſter and church-wardens, &c. is a condition precedent to the payment of the loſs; and that the inſured has no title to demand any loſs, without this certificate, though he ſhould be able to ſhew that the miniſter and church-wardens had wrongfully refuſed to ſign one.

It is now ſettled that the procuring the certificate is a condition precedent to the payment of any loſs; and that its being wrongfully refuſed will not excuſe the want of it.

That was an action brought by the aſſignees of the inſured, who had become bankrupts, againſt the *Phœnix* inſurance company. The plaintiffs in their declaration, after ſtating the loſs, and notice to the office, alleged that the bankrupts, ſoon after the loſs, procured and delivered to the company a certificate under the hands of

Wood and others aſſignees of *Lockyer* and *Bream* v. *Worſley*. 2 H. *Bl.* 574, 6 T. R. 710.

of divers reputable houſeholders in the pariſh, in the uſual form; and that, '*as ſoon as poſſible after the loſs,* '*they applied to, and requeſted, the miniſter and church-war-* '*dens of the pariſh to ſign ſuch certificate; but that the ſaid* '*miniſter and church-wardens, without any reaſonable or prob-* '*able cauſe whatſoever, did wrongfully and unjuſtly refuſe* '*to ſign any ſuch certificate as aforeſaid.*' There was another ſimilar count, only omitting the requeſt to the miniſter and church-wardens to ſign the certificate, and their refuſal.—To the firſt count, the defendant pleaded; 1ſt. Want of intereſt in the bankrupts; 2dly. That the loſs happened by fraud; and 3dly, That the miniſter and church-wardens did not wrongfully, and without probable cauſe, refuſe to ſign the certificate.—*To the* ſecond count the defendant pleaded ſimilar pleas, as to want of intereſt and fraud; and 3dly. That neither the bankrupts nor the plaintiffs had procured any certificate from the miniſter, church-wardens, and reputable inhabitants, as is required by the ſaid printed propoſals.—By the replication iſſue was joined on the firſt five pleas; and, as to the laſt plea, the plaintiffs aſſigned the ſame excuſe for the want of the certificate from the miniſter, &c. as in the firſt count of the declaration; *and this* having proceeded to iſſue, the cauſe was tried and the plaintiffs obtained a verdict for 3000 l.—The defendant moved in arreſt of judgment on the ſame ground, as in the caſe of *Oldman* v. *Bewicke*, (*a*) namely, that the production of the certificate was a condition precedent to the payment of loſs, and that the plaintiffs not having averred performance, had ſhewn no title to recover.—After the argument, Lord C. J. *Eyre*, Mr. Juſtice *Buller*, and Mr. Juſtice *Rooke*, ſeemed to be of opinion that, ſuppoſing the printed propoſals to be conditions precedent, there had been a performance *cy pres*; but that, in truth, the policy being a commercial contract, was to be conſtrued liberally, and the true queſtion was, whether the loſs had been fairly incurred. If it had, and it appeared on the record to have ſo happened, the refuſal of the miniſter

(*a*) Sup. 703.

miniſter and church-wardens was without cauſe, and therefore the plaintiffs were entitled to maintain their action. But Mr. Juſtice *Heath* appeared to differ from the reſt of the court, and time was taken to deliberate.—Afterwards, judgment was given for the plaintiffs, *pro formâ*, as it was underſtood that a writ of error would be brought, whichever way the judgment ſhould be given. —Upon this writ of error, the court of King's Bench, after two arguments, reverſed the judgment of the court of Common Pleas, being unanimouſly of opinion that the production of the certificate was a condition precedent.—Lord *Kenyon* ſaid he did not ſee how the term *cy pres* was applicable to this ſubject; that the argument founded on this, went to ſhew that if none of the inhabitants of this pariſh would certify, a certificate from the inhabitants of the next, or of any other pariſh, would have anſwered the purpoſe. But he ſaid that the inſured could not ſubſtitute other terms or conditions in lieu of thoſe, which all the parties to the contract had originally made.

APPENDIX.

APPENDIX.

No. I.

Form of a valued Policy of Inſurance upon Ships and Goods, by private Underwriters.

£. 10,000 ——— S. G. Delivered the Day of } IN the name of God, *Amen.* as well in own name as for and in the name and names of all and every other perſon or perſons to whom the ſame doth, may, or ſhall, appertain, in part or in all, doth make aſſurance, and cauſe and them, and every of them, to be inſured, loſt or not loſt, at and from upon any kind of goods and merchandizes, and alſo upon the body, tackle, apparel, ordnance, munition, artillery, boat, and other furniture, of and in the good ſhip or veſſel called *The* whereof is maſter, under God, for this preſent voyage or whoſoever elſe ſhall go for maſter in the ſaid ſhip, or by whatſoever other name or names the ſame ſhip, or the maſter thereof, is or ſhall be named or called: Beginning the adventure upon the ſaid goods and merchandizes from the loading thereof aboard the ſaid ſhip upon the ſaid ſhip, *&c.* and ſo ſhall continue and endure during her abode there, upon the ſaid ſhip, *&c.*: And further, until the ſaid ſhip, with all her ordnance, tackle, apparel, *&c.* and goods and merchandizes whatſoever, ſhall be arrived at upon the ſaid ſhip, *&c.* until ſhe hath moored at anchor twenty-four hours in good ſafety, and upon the goods and merchandizes until the ſame be there diſcharged and ſafely landed: And it ſhall be lawful for the ſaid ſhip, *&c.* in this voyage to proceed and ſail to and touch and ſtay at any ports or places whatſoever without prejudice to this inſurance; the ſaid ſhip, *&c.* goods and merchandizes, *&c.* for ſo much as concerns the aſſureds, by agreement between the aſſureds and aſſurers, in this policy, are and ſhall be valued at

Touching the adventures and perils which we the aſſurers are contented to bear and do take upon us in this voyage, they are,

of the ſeas, men of war, fire, enemies, pirates, rovers, thieves, jettiſons, letters of mart and countermart, ſurprizals, takings at ſea, arreſts, reſtraints, and detainments of all kings, princes and people, of what nation, condition, or quality ſoever, barratry of the maſter and mariners, and of all other perils, loſſes, and misfortunes, that have or ſhall come to the hurt, detriment, or damage, of the ſaid goods and merchandizes, and Ship, *&c.* or any part thereof; and in caſe of any loſs or misfortune it ſhall be lawful to the aſſureds, their factors, ſervants, and aſſigns, to ſue, labour and travel, for, in, and about, the defence, ſafeguard, and recovery, of the ſaid goods and merchandizes, and ſhip, *&c.* or any part thereof, without prejudice to this inſurance, to the charges whereof we the aſſurers will contribute *each one* according to the rate and quantity of his ſum *herein aſſured*: And it is agreed by us the inſurers that this writing or policy of aſſurance ſhall be of as much force and effect as the ſureſt writing or policy of aſſurance heretofore made in *Lombard Street*, or in the *Royal Exchange*, or elſewhere in *London*: And ſo we the aſſurers are contented, and do hereby promiſe and bind ourſelves, each one for his own part, our heirs, executors, and goods, to the aſſureds, their executors, adminiſtrators, and aſſigns, for the true performance of the *premiſes*, confeſſing ourſelves paid the conſideration due unto us for this aſſurance by the aſſured

at and after the rate of

In witneſs whereof we the aſſurers have ſubſcribed our names and ſums aſſured in *London*.

N. B. Corn, fiſh, ſalt, fruit, flour, and ſeed, are warranted free from average, unleſs general, or the ſhip be ſtranded;—Sugar, tobacco, hemp, flax, hides, and ſkins, are warranted free from average under five pounds *per cent.*; and all other goods, alſo the ſhip and freight, are warranted free of average under three pounds *per cent.* unleſs general, or the ſhip be ſtranded.

No.

No. II.

Form of a Policy of Inſurance on Ship and Goods, by the Royal Exchange Aſſurance Company.

S. G. } S. G. No.
N. } L

By the Corporation of the *Royal Exchange* Aſſurance.

IN the Name of God, *Amen.*

as well in own name as for and in the name and names of all and every other perſon or perſons to whom the ſame doth, may, or ſhall, appertain, in part or in all, doth make aſſurance, and cauſeth and them, and every of them, to be aſſured, loſt or not loſt, upon any kind of goods and merchandizes whatſoever, loaden or to be loaden, and alſo upon the body, tackle, apparel, ordnance, munition, artillery, boat, and other furniture, of and in the good ſhip or veſſel called *The* burthen, or thereabouts, whereof is maſter (under God) for this preſent voyage or whoſoever elſe ſhall go for maſter in the ſaid ſhip, or by whatſoever other name or names the ſame ſhip or the maſter thereof is or ſhall be named or called: Beginning the adventure upon the ſaid goods and merchandizes from and immediately following the loading thereof on board the ſaid ſhip and upon the ſaid ſhip, *&c.* and ſo ſhall continue and endure during her abode there upon the ſaid ſhip, *&c.* and further until the ſaid ſhip, with all her ordnance, tackle, apparel, *&c.* and goods and merchandizes whatſoever, ſhall be arrived at upon the ſaid ſhip, *&c.* until ſhe hath there moored at anchor twenty-four hours in good ſafety, and upon the goods and merchandizes, until the ſame be there diſcharged and ſafely landed: And it ſhall be lawful for the ſaid ſhip, *&c.* in this voyage, to proceed and ſail to, and touch and ſtay at, any ports or places whatſoever, without prejudice to this Aſſurance, the ſaid ſhip, *&c.* goods and merchandizes,

merchandizes, &c. for ſo much as concerns the aſſureds, (by agreement made between the aſſureds and the ſaid corporation in this policy,) are and ſhall be rated and valued at Sterling, without farther account to be given by the aſſureds for the ſame. Touching the adventures and perils which the ſaid corporation are contented to bear and do take upon them in this voyage, they are, of the ſeas, men of war, fire, enemies, pirates, rovers, thieves, jettiſons, letters of mart and countermart, ſurprizals, takings at ſea, arreſts, reſtraints, and detainments of all kings, princes, and people, of what nation, condition, or quality ſoever, barratry of the maſter and mariners, and of all other perils, loſſes, and misfortunes, that have or ſhall come to the hurt, detriment, or damage, of the ſaid goods and merchandizes, *and ſhip, &c.* or any part thereof: And in caſe of any *loſs or misfortune* it ſhall be lawful to the aſſureds, their factors, ſervants, and aſſigns, to ſue, labour, and travel, for, in, and about, the defence, ſafeguard, and recovery, of the ſaid goods and merchandizes, and ſhip, &c. (or any part thereof,) without prejudice to this aſſurance, to the charges whereof the ſaid corporation will contribute according to the rate and quantity of the ſum herein aſſured: And it is agreed by the ſaid corporation that this writing or policy of aſſurance ſhall be of as *much* force and effect as the ſureſt writing or policy of aſſurance heretofore made in *Lombard Street*, or in the *Royal Exchange*, or elſewhere in *London*: And ſo the ſaid corporation are contented, and do hereby promiſe and bind themſelves and their ſucceſſors to the aſſureds, their executors, adminiſtrators, and aſſigns, for the true performance of the premiſes, confeſſing themſelves paid the conſideration due unto them for this Aſſurance by at and after the rate of *per cent.* In witneſs whereof the ſaid Corporation have cauſed their common ſeal to be hereunto affixed, and the ſum or ſums by them aſſured to be hereunder written, at their office in the *Royal Exchange* of *London* this day of in the year of the reign of our Sovereign Lord by the grace of God, of the united kingdom of *Great Britain* and *Ireland*, King, Defender of the Faith, and in the year of our Lord

The ſaid corporation are content with this aſſurance for

Free

Free from all average on corn, flour, fish, ſalt, fruit, ſeed, hides, and tobacco, unleſs general, or otherwiſe ſpecially agreed.

Free from average on ſugar, rum, ſkins, hemp, and flax, under five *per cent.*; and on all other goods, and on ſhip, under three *per cent.* except general.

By order of the Court of Directors.

No. III.

Form of a Policy of Inſurance on Ship and Goods by the London Aſſurance Company.

SHIP AND GOODS.

London Aſſurance Houſe.

No. No. in *London*.

By the Governor and Company of the *London* Aſſurance.

IN the name of God, *Amen*.

as well in own name as for and in the name and names of all and every other perſon or perſons to whom the ſame doth, may, or ſhall, appertain, in part or in all, doth make aſſurance, and cauſeth and them, and every of them, to be aſſured, loſt or not loſt, at and from upon any kind of goods and merchandizes whatſoever; and alſo upon the body, tackle, apparel, ordnance, munition, artillery, boat, and other furniture, of and in the good ſhip or veſſel called *The* whereof is maſter (under God) for this preſent voyage or whoever elſe ſhall go for maſter in the ſaid ſhip or veſſel, or by whatſoever other name or names the ſaid ſhip or veſſel, or the maſter thereof, is or ſhall be named or called: Beginning the adventure upon the ſaid goods and merchandizes from and immediately following the loading thereof aboard the ſaid ſhip or veſſel at and upon the

the ſaid ſhip or veſſel, &c. . . . . and ſo ſhall continue and endure during her abode there, upon the ſaid ſhip or veſſel, &c.; and farther, until the ſaid ſhip or veſſel, with all her ordnance, tackle, apparel, &c. and goods and merchandizes whatſoever, ſhall be arrived at . . . . and upon the ſaid ſhip or veſſel, &c. until ſhe hath moored at anchor twenty-four hours in good ſafety, and upon the goods and merchandizes, until the ſame be there ſafely diſcharged and landed: And it ſhall be lawful for the ſaid ſhip or veſſel, &c. in this voyage, to proceed and ſail to, and touch and ſtay at, any ports or places whatſoever . . . without prejudice to this aſſurance, the ſaid ſhip or veſſel, &c. goods and merchandizes, &c. for ſo much as concerns the aſſureds, (by agreement between the aſſureds and the *London* aſſurance,) are and ſhall be rated and valued at . . . without farther or other account to be given by the aſſureds for the ſame. Touching the adventures and perils, which the ſaid *London* aſſurance are contented to bear and do take upon them in this voyage, they are, of the ſeas, men of war, fire, enemies, pirates, rovers, thieves, jettiſons, letters of mart and countermart, ſurprizals, takings at ſea, arreſts, reſtraints, and detainments of all kings, princes, and people, of what nation, condition, or quality ſoever, barratry of the maſter and mariners, and of all other perils, loſſes, and misfortunes, that have or ſhall come to the hurt, detriment, or damage, of the ſaid goods and merchandizes, and ſhip or veſſel, &c. or any part thereof: And in caſe of any loſs or misfortune, it ſhall be lawful to the aſſureds, their factors, ſervants, and aſſigns, to ſue, labour, and travel, for, in, and about, the defence, ſafeguard, and recovery, of the ſaid goods, merchandizes, and ſhip or veſſel, &c. or any part thereof, without prejudice to this aſſurance, to the charges whereof the ſaid *London* aſſurance will contribute according to the rate and quantity of the ſum herein aſſured: And it is agreed that this writing or policy of aſſurance ſhall be of as much force and effect as the ſureſt writing or policy of aſſurance heretofore made in *Lombard Street*, or in the *Royal Exchange*, or elſewhere in *London*: And ſo the ſaid *London* aſſurance are contented, and do hereby promiſe and bind themſelves and their ſucceſſors to the aſſureds, their executors, adminiſtrators, and aſſigns, for the true performance of the premiſes, confeſſing themſelves paid the conſideration due unto them for this aſſurance by the aſſured, at and after the rate of . . . *per cent.* In witneſs

neſs whereof the ſaid *London* aſſurance have cauſed their common ſeal to be hereunto affixed, and the ſum or ſums by them aſſured to be hereunder written, at their office in *London*, this day of in the year of the reign of our Sovereign Lord by the grace of God, of the united kingdom of *Great Britain* and *Ireland*, King, Defender of the Faith, and in the year of our Lord

"Free from all average on corn, flour, fruit, fiſh, ſalt, and ſeeds, except general.

Free from average on ſugar, rum, hides, ſkins, hemp, flax, and tobacco, under five pounds *per cent.*; and on all other goods, and ſhip, under three pounds *per cent.* except general.

The ſaid governor and company are content with this aſſurance for

No. IV.

No. IV.

Form of a Bill of Bottomry, by deed poll, where the Ship is to go to ſeveral Ports.

TO ALL PEOPLE, &c. I, *A. B.* of, &c. mariner, maſter, and part owner of the good ſhip or veſſel, called, &c. of *London*, of the burthen of two hundred tons, or thereabouts, now riding at anchor in the river *Thames*, within the port of *London*, do ſend greeting: WHEREAS the ſaid ſhip is now bound out upon a voyage from the ſaid port, unto the iſland of *Barbadoes*, and from thence, if occaſion ſhall be, to the iſland of *May*, and ſo to return back again to the ſaid iſland of *Barbadoes*, and thence to *London*, to end her voyage: Now KNOW YE, that I the ſaid *A. B.* for myſelf, my executors and adminiſtrators, do covenant and grant, to and with *C. D.* of, &c. (who, before the ſealing and delivery hereof, hath paid and advanced unto me the ſaid *A. B.* the ſum of 500 l. of lawful money of *Great Britain*, and is contented and hath agreed to ſtand to, and bear the adventure of the ſaid ſum upon the body of the ſaid ſhip, during the ſaid voyage,) and to and with the executors, adminiſtrators, and aſſigns of the ſaid *C. D.* by theſe preſents: That the ſaid ſhip, with the firſt good wind and weather after the . . . . . day of . . . . . next enſuing the date hereof, ſhall depart from the ſaid river *Thames*, on the ſaid intended voyage, and ſhall, by God's grace, (the perils and dangers of the ſea, and reſtraint of princes and rulers excepted,) return into the ſaid river *Thames* from her ſaid voyage before the expiration of fourteen months, to be accounted from the date of theſe preſents; and that the ſaid ſhip, in her ſaid intended voyage, ſhall not ſail or apply unto any other ports or places than thoſe before mentioned herein, unleſs ſhe ſhall be neceſſitated thereto, by extremity of weather, or other unavoidable accident. And that I the ſaid *A. B.* my executors, adminiſtrators, or aſſigns, ſhall and will well and truly pay, or cauſe to be paid, unto the ſaid *C. D.* his executors, adminiſtrators, or aſſigns, at, &c. the ſum of 560 l. of lawful money of *Great Britain*, in reſpect of the adventure aforeſaid, if the ſaid ſhip ſhall go only to the iſland of *Barbadoes*, and from thence return to *London* to finiſh her ſaid intended voyage; and the ſum of 600 l. of like money,

if

if the ſaid ſhip ſhall go from thence to the iſland of *May*, and ſo return again to the ſaid iſland of *Barbadoes*, and thence to *London* to end her ſaid voyage: and that within one month after the return of the hull or body of the ſaid ſhip unto the river *Thames*, from her ſaid voyage. PROVIDED ALWAYS, and it is nevertheleſs the true intent and meaning of theſe preſents, That if the ſaid ſhip, in her intended voyage, ſhall happen to be loſt, miſcarry, or be taken by men of war, or pirates, that then this preſent writing or deed, and every covenant, payment, matter, and thing therein contained, on the part and behalf of me the ſaid *A. B.* to be done, paid, and performed, ſhall be void and of none effect: And that then I the ſaid *A. B.* my executors or adminiſtrators, ſhall not be anywiſe chargeable or liable to pay the ſaid ſeveral ſums before mentioned, or either of them, or any part thereof, to the ſaid *C. D.* his executors, adminiſtrators, or aſſigns, but that he and they are to loſe the ſame, and every part thereof; any thing hereinbefore contained to the contrary thereof, in anywiſe notwithſtanding. AND it is agreed, by and between the ſaid parties to theſe preſents, that in caſe the ſaid ſhip ſhall not be returned unto the river *Thames*, from the ſaid intended voyage, at the end of fourteen months, to be accounted from the date of theſe preſents; and that, at the expiration of the ſaid fourteen months, there ſhall not be juſt proof made of the loſs happening within the time aforeſaid; that then, I the ſaid *A. B.* my executors, adminiſtrators, or aſſigns, ſhall and will, within twenty days next after the end and expiration of the ſaid fourteen months, well and truly pay, or cauſe to be paid, unto the ſaid *C. D.* his executors, adminiſtrators, or aſſigns, at the place of payment aforeſaid, the ſaid ſum of 560 l. in caſe the ſaid ſhip ſhall go unto the ſaid iſland of *Barbadoes* as aforeſaid, and the ſaid ſum of 600 l. in caſe the ſaid ſhip ſhall go unto the ſaid iſland of *May* as aforeſaid; and that the ſaid *C. D.* ſhall not run the hazard and adventure of the ſaid ſum by him adventured as aforeſaid, upon the body of the ſaid ſhip, any longer than fourteen months, to be reckoned and accounted as aforeſaid. In witneſs, &c.

No.

No. V.

Form of a Reſpondentia Bond, upon an Eaſt India *Voyage.*

KNOW ALL MEN by theſe preſents, that I, *A. B.* of in the county of , mariner, am held and firmly bound to *C. D.* of, *&c.* in the ſum or penalty of 1000 l. of lawful money of *Great Britain*, to be paid to the ſaid *C. D.* or to his certain attorney, executors, adminiſtrators, or aſſigns, to which payment, well and truly to be made, I the ſaid *A. B.* do bind myſelf, my heirs, executors, and adminiſtrators firmly, by theſe preſents, ſealed with my ſeal, DATED this 23d day of *January*, in the forty-ſecond year of the reign of our Sovereign Lord *George* the third, by the grace of God, of the united kingdom of *Great Britain* and *Ireland*, King, Defender of the Faith, and in the year of our Lord 1802.

WHEREAS the above named *C. D.* on the day of the date *above* written, advanced and lent unto the ſaid *A. B.* the ſum of 500 l. upon the goods, merchandize, and effects laden and to be laden on board the good ſhip or veſſel called *The Saint George*, now riding at anchor in the river *Thames* outward bound, and whereof one *E. F.* is commander. NOW THE CONDITION of this obligation is ſuch, that if the ſaid ſhip or veſſel do and ſhall, with all convenient ſpeed, proceed and ſail from and out of the ſaid river *Thames*, on a voyage to any port or place, ports or places, in the *Eaſt Indies*, *China*, *Perſia*, or elſewhere beyond the *Cape of Good Hope*; and from thence do and ſhall ſail, return, and come back into the ſaid river *Thames*, at or before the end and expiration of 36 kalendar months, to be accounted from the day of the date above written, and there to end her ſaid intended voyage, (the dangers and caſualties of the ſeas excepted;) AND if the ſaid *A. B.* his heirs, executors, or adminiſtrators, do and ſhall within thirty days next after the ſaid ſhip or veſſel ſhall be returned to the ſaid port of *London*, from her ſaid intended voyage, or at and upon the end and expiration of the ſaid thirty-ſix kalendar months, to be accounted as aforeſaid, (which of the ſaid times ſhall firſt and next happen,) well and truly pay, or cauſe to be paid, unto the ſaid *C. D.* his executors, adminiſtrators, or aſſigns, the full ſum of

500 l.

500 l. of lawful money of *Great Britain*, together with the ſum of 12 l. of like lawful money *per* kalendar month, for each and every kalendar month; and ſo proportionably for a greater or leſs time than a kalendar month for all ſuch time, and ſo many kalendar months as ſhall be elapſed and run out of the ſaid thirty-ſix kalendar months, over and above twenty kalendar months, to be accounted from the day of the date above written; OR if, in the ſaid voyage, and within the ſaid thirty-ſix kalendar months to be accounted as aforeſaid, an utter loſs of the ſaid ſhip or veſſel by fire, enemies, men of war, or any other caſualties, ſhall unavoidably happen, and the ſaid *A. B.* his heirs, executors, or adminiſtrators, do and ſhall, within ſix kalendar months next after ſuch loſs, well and truly account for (upon oath if required,) and pay unto the ſaid *C. D.* his executors, adminiſtrators, or aſſigns, a juſt and proportionable average on all the goods and effects of the ſaid *A. B.* carried from *England* on board the ſaid ſhip or veſſel, and the net proceeds thereof, and on all other goods and effects which the ſaid *A. B.* ſhall acquire during the ſaid voyage, for or by reaſon of ſuch goods, merchandizes, and effects, and which ſhall not be unavoidably loſt; then the above written obligation to be void and of none effect, elſe to ſtand in full force and virtue.

Sealed and delivered,
(being firſt duly ſtamped)
In the preſence of

No.

No. VI.

Form of a Policy of Inſurance upon a Life, for the Life of the inſured, by the SOCIETY FOR EQUITABLE ASSURANCES UPON LIVES.

THIS PRESENT INSTRUMENT OR POLICY OF INSURANCE witneſſeth, that whereas *A. B.* of in the county of hath entered into and become a member of the ſociety for EQUITABLE ASSURANCES on lives and ſurvivorſhips, according to a certain deed of ſettlement bearing date the ſeventh day of *September*, which was in the year of our Lord one thouſand ſeven hundred and ſixty-two, and enrolled in his majeſty's court of *King's Bench* at *Weſtminſter*; and whereas the ſaid ſociety, relying upon the truth of a certain declaration, dated this day of made and ſigned by the ſaid *A. B.* touching the age, ſtate of health, and other circumſtances attending the ſaid *A. B.* have aſſured to the ſaid *A. B.* the ſum of pounds, to be paid to his executors, adminiſtrators, or aſſigns, after the deceaſe of the ſaid *A. B.* whenſoever the ſame ſhall happen; provided the ſaid aſſured does not exceed the age of years on this day of has had the ſmall pox, and is not afflicted with any diſorder which tends to the ſhortening of life, (as in the ſaid declaration more fully is ſet forth,) at and under the annual ſum or premium of

And whereas the ſaid aſſured hath executed the covenants uſually entered into by members of the ſaid ſociety, and hath paid ſuch premium for one whole year, commencing from the date of theſe preſents: Now we, whoſe names are hereunto ſubſcribed, and ſeals affixed, being two of the truſtees of the ſaid ſociety, do, for ourſelves, and our aſſigns, truſtees of the ſaid ſociety, covenant, promiſe, and agree, to and with the ſaid aſſured, and the executors, adminiſtrators, and aſſigns of the ſaid aſſured, that if the ſaid aſſured, or the aſſigns of the ſaid aſſured, ſhall yearly and every year, during the term of this aſſurance, continue to pay to the truſtees of the ſaid ſociety,

ſociety, or to any two or more of them, the annual ſum or premium aforeſaid, on or before the day of in every year; and ſhall obſerve, perform, fulfil, and keep all and ſingular the covenants, articles, clauſes, proviſos, conditions, and agreements, which on the part and behalf of the ſaid aſſured, are and ought to be obſerved, performed, fulfilled, and kept, according to the true intent and meaning of the ſaid deed of ſettlement: We, or our aſſigns, truſtees of the ſaid ſociety for the time being, will or ſhall, within ſix kalendar months, after ſatisfactory proof ſhall have been made of the death of the ſaid aſſured, well and truly pay, or cauſe to be paid, out of the ſtock or fund of the ſaid ſociety, unto the executors, adminiſtrators, or aſſigns, of the ſaid aſſured, the full ſum ſo hereby aſſured: Provided always, and it is hereby declared to be the true intent and meaning of this policy of aſſurance, and the ſame is accepted by the ſaid aſſured upon theſe expreſs conditions, that in caſe the ſaid aſſured ſhall die upon the ſeas, or ſhall go beyond the limits of *Europe*, unleſs licenſe be obtained from the court of directors, or ſhall die by his own hands, or by the hands of juſtice; or if the age of the ſaid aſſured does exceed years; or if the ſaid aſſured be now afflicted with any diſorder which tends to the ſhortening of life; or if the above mentioned declaration contains any untrue averment, this policy ſhall be void.

In witneſs, *&c.*

No

No. VII.

Form of a Policy of Inſurance againſt Fire.

By the Corporation of the *Royal Exchange* Aſſurance of Houſes and Goods from Fire.

THIS preſent inſtrument or policy of aſſurance witneſſeth, that whereas *A. B.* hath agreed to pay into the treaſury of the corporation of the *Royal Exchange, London*, for the aſſurance of from loſs or damage by fire. *Now know all men by theſe preſents*, That the capital ſtock, eſtate, and ſecurities of the ſaid corporation ſhall be ſubject and liable to pay, make good, and ſatisfy unto the ſaid aſſured, his heirs, executors, or adminiſtrators, any loſs or damage which ſhall or may happen by fire to the ſaid goods aforeſaid, (except ſuch goods as hemp, flax, tallow, pitch, tar, turpentine, glaſs, china, and earthen wares, writings, books of accounts, notes, bills, bonds, tallies, ready money, jewels, plate, pictures, gun-powder, hay, ſtraw, and corn unthreſhed,) within the ſpace of twelve kalendar months from the day of the date of this inſtrument or policy of aſſurance, not exceeding the ſum of and ſhall ſo continue, remain, and be ſubject and liable, as aforeſaid, from year to year, to be computed from the day of in every year, for ſo long time as the ſaid aſſured ſhall well and truly pay, or cauſe to be paid, the ſum of into the treaſury of the ſaid corporation, on or before the day of which ſhall be in each ſucceeding year, and the ſaid corporation ſhall agree thereto by accepting and receiving the ſame; which ſaid loſs or damage ſhall be paid in money immediately after the ſame ſhall be ſettled and adjuſted; or otherwiſe, if the ſaid loſs or damage ſhall not be adjuſted, ſettled, and paid within ſixty days after notice thereof ſhall be given to the ſaid corporation, by the ſaid aſſured, that then the ſaid corporation, their officers, workmen, or aſſigns, ſhall, at the charge of the ſaid corporation, at the end and expiration of the ſaid ſixty days, provide and ſupply the ſaid aſſured with the like quantity of goods of the ſame ſort and kind, and of equal value and goodneſs with thoſe burnt or damnified

damnified by fire. *Provided always nevertheleſs*, and it is hereby declared to be the true intent and meaning of this deed or policy, that the ſaid ſtock, eſtate, and ſecurities of the ſaid corporation ſhall not be ſubject or liable to pay or make good to the aſſured any loſs or damage by fire which ſhall happen by any invaſion, foreign enemy, or any military or uſurped power whatſoever. *Provided alſo*, that this deed or policy ſhall not take place or be binding to the ſaid corporation, until the premium for one year is paid, or in caſe the ſaid aſſured ſhall have already made, or ſhall hereafter make any other aſſurance upon the goods aforeſaid, unleſs the ſame ſhall be allowed of and ſpecified upon the back of this policy: Or if the ſaid *A. B.* at the time when any ſuch fire ſhall happen, ſhall be in the poſſeſſion of, or let to any perſon who ſhall uſe or exerciſe therein the trade of a ſugar baker, apothecary, chemiſt, colour-man, diſtiller, bread or biſcuit baker, ſhip or tallow chandler, ſtable keeper, innholder, or maltſter, or ſhall be made uſe of for the ſtowing or keeping of hemp, flax, tallow, pitch, tar, or turpentine; but that in all or any of the ſaid caſes theſe preſents, and every clauſe, article, and thing, herein contained, ſhall ceaſe, determine, and be utterly void and of none effect, or otherwiſe ſhall remain in full force and virtue. In witneſs whereof, the ſaid corporation have cauſed their common ſeal to be hereunto affixed, the day of in the year of the reign of our Sovereign Lord by the grace of God, of the united kingdom of *Great Britain* and *Ireland*, King, Defender of the Faith, *&c.* and in the year of our Lord one thouſand eight hundred .

N. B. This policy to be of no force if aſſigned, unleſs ſuch aſſignment be allowed by an entry thereof in the books of the company.

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